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Interpretive Explanation and Analysis of the FOREIGN DIRECT INVESTMENT REGULATIONS

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Chapter X—Office of Foreign Direct Investments, Department of Commerce

[1970 General Bulletin]

PART 1000—FOREIGN DIRECT INVESTMENT REGULATIONS

Interpretative Analyses and Statements With Respect to the Regulations

Notice is hereby given that the Office of Foreign Direct Investments (OFDI) has issued the following 1970 General Bulletin (the 1970 Bulletin or the Bulletin), interpreting and analyzing the Foreign Direct Investment Regulations (the regulations) applicable to the Foreign Direct Investment Program (the program) for calendar year 1970.

The purpose of the Bulletin is to interpret, explain and amplify, by text and illustrative examples, principal provisions of the current regulations. Statements in the Bulletin may have the effect of qualifying or modifying provisions of the regulations, the instructions applicable to reporting forms or other official OFDI publications. Unless subsequently modified or rescinded by public notice, statements contained in this Bulletin shall represent the official position of OFDI.

General Bulletin No. 1 and General Bulletin No. 2, dated October 10 and 25, 1968 (33 F.R. No. 198 (Part II) and No. 209 (Part III), respectively) were issued by OFDI as general interpretive guidelines for the regulations applicable to the program in effect during 1968. The 1969 General Bulletin, issued November 5, 1969 (34 F.R. 17806), interpreted the regulations as in effect during 1969. To the extent expressly or implicitly overruled or modified by the 1970 Bulletin, General Bulletin Nos. 1 and 2 and the 1969 General Bulletin are hereby superseded insofar as concerns compliance with the regulations in effect for 1970, and extreme care should be exercised in basing substantive decisions upon the material in those Bulletins. In case of doubt concerning relevance of any such material, OFDI should be consulted.

This 1970 General Bulletin is principally interpretive and, to the extent that any provision of the regulations or other official OFDI publications may be modified, the changes are generally in the nature of liberalization or relaxation. Accordingly, it is not deemed necessary in the public interest to publish the Bulletin in proposed form for comment.

Effective date. The 1970 General Bulletin, as set forth below, shall be effective on the date of publication in the Federal Register.

(Sec. 5, Act of Oct. 6, 1917, 40 Stat. 415, as amended, 12 U.S.C. 95a; E.O. 11387, Jan. 1, 1968, 33 F.R. 47)

Richard P. Urfer,
Director, Office of Foreign Direct Investments.

September 17, 1970.

Editorial Note: The Foreign Direct Investment Regulations are published in Title 15, Chapter X, Part 1000 of the Code of Federal Regulations (CFR). All sections of the regulations contained in CFR are preceded by the designation "1000" (e.g., § 1000.201). The "1000" designation has, for convenience, been eliminated from section references contained in this 1970 General Bulletin. Sections of the Bulletin correspond to section numbers of the regulations, but are distinguished by use of the prefix "B" and a hyphenated numeral suffix indicating major topical divisions of the analytical discussion (e.g., § B201-1). The abbreviations "DI" and "AFN" are used to refer to "direct investor" and "affiliated foreign national," respectively.

Table of Contents for 1970 General Bulletin

The appendix to this Bulletin was not filed with the Office of the Federal Register. The material contained in the appendix was issued on the date indicated and distributed by OFDI to DIs and other interested persons. The appendix will be included in the reprint of this 1970 General Bulletin to be issued by OFDI following publication in the FEDERAL REGISTER.

Introduction

General.

This 1970 General Bulletin is designed to provide a reliable and authoritative source of information concerning interpretation and application of the regulations as in effect for 1970.

The program is administered on a calendar year basis, and a number of amendments to the regulations have been made for 1970.

In connection with questions arising under the regulations as in effect during 1968 and 1969, direct investors (DIs) should refer to General Bulletins Nos. 1 and 2 (33 F.R. 15158 and 15834) and to the 1969 General Bulletin (34 F.R. 17806). However, examples in this 1970 Bulletin illustrating transactions occurring in 1968 or 1969 are dispositive of the same questions under the 1970 regulations, unless expressly indicated that the transaction involves only the regulations as in effect for 1968 or 1969.

Program changes in 1970.

The following are the major changes made in the program for 1970:

(i) *Section 507 alternative minimum and Schedule A supplemental allowable.* Section 507 provides a new direct investment allowable that DIs may elect starting in 1970. The § 507 allowable consists of a $1 million modified worldwide allowable (alternative minimum allowable) and a supplemental allowable of $4 million for use in Schedule A.

(ii) *Section 506 incremental earnings allowable.* Originally promulgated in 1968, the incremental earnings allowable may be used for making direct investment commencing in 1970.

(iii) *Elimination of aggregate annual loss rule in § 503.* DIs electing the § 503 worldwide minimum allowable are no longer required to disregard "aggregate annual losses" as was required in 1969.

(iv) *Liberalization of Schedule C historical allowable.* The § 504(a) historical allowable in Schedule C is no longer subject to the limitation imposed by the "reinvestment ratio" alternative method of computing such allowable.

(v) *Conditions for making long-term foreign borrowing.* Starting May 1, 1970, DIs have greater flexibility in making borrowings that will qualify as long-term foreign borrowing. In general, under amended § 324 a long-term foreign borrowing is foreign borrowing that is in fact outstanding (including refinancing thereof) for a period of at least 12 months. A revised standard certificate Form FDI-106 has been issued for Subpart J certification of borrowings made on or after May 1, 1970 pursuant to amended § 324.

(vi) *General treatment for overseas finance subsidiaries.* During 1968 and 1969 OFDI specifically authorized DIs, in effect, to treat as proceeds of long-term foreign borrowing funds borrowed long-term by an overseas finance subsidiary (OFS) from sources outside the United States and Canada. New Subpart N makes this treatment generally available without the necessity of obtaining specific authorization.

Summary of the regulations.

The regulations contain the operative rules of the Program, the principal features of which are discussed in general terms below.

(i) *Applicability.* The regulations apply to "direct investors." A DI is any person (whether an individual or a business entity) within the United States that owns or holds a 10 percent or greater interest in an incorporated or unincorporated foreign entity (§ 305). A foreign entity in which such interest is owned or held is referred to as an "affiliated foreign national" ("AFN") (§ 304). Interest in an AFN is measured by voting power in the case of a corporation and by the right to a share of profits in the case of an unincorporated enterprise (§ 304(b)(2)). Persons may be DIs either in their individual capacity or by virtue of their relationships with other U.S. persons (§§ 903–906). The regulations specifically do not apply to banks or other financial institutions subject to the Voluntary Foreign Credit Restraint Program administered by the Board of Governors of the Federal Reserve System (§ 201(b)(2)).

(ii) *Requirements and restrictions.* Three fundamental requirements are imposed on all DIs:

The amount of annual direct investment in AFNs must not exceed the level authorized under the general allowables provided for in the regulations or the amount specifically authorized by OFDI;

The amount of certain foreign balances or other forms of foreign property must be restricted as specified in the regulations; and

Reports reflecting allowables and transactions pertinent to foreign direct investment activities must be filed with OFDI.

DIs may seek relief from a particular restraint imposed by the regulations through application to OFDI for specific authorizations or exemptions (§ 801).

A DI making foreign direct investment in excess of that authorized either generally under the regulations or specifically by OFDI, or otherwise violating the program restrictions, is subject to enforcement proceedings. Noncompliance with the requirements of the regulations may give rise to imposition of sanctions, either criminal or administrative (§§ 201(d) and 701). Rules and procedures concerning the enforcement function of OFDI (including investigations and administrative remedies) are contained in 15 CFR Parts 1020–1050.

(iii) *Calculation of direct investment.* Direct investment by a DI is calculated on a calendar year basis by adding the DI's net transfer of capital to AFNs and the DI's share of earnings reinvested by incorporated AFNs (§ 306(a)).

"Net transfer of capital" means (a) aggregate transfers of capital by a DI to incorporated AFNs during the year, less (b) aggregate transfers of capital by incorporated AFNs to the DI during the same period, plus (c) the DI's share of net increase or decrease in net assets of unincorporated AFNs (§ 313). A transfer of funds or other property that increases a DI's aggregate equity and debt investment in an AFN is generally a transfer of capital by the DI to the AFN (§ 312(a)). A transfer of funds or other property that decreases a DI's investment in an AFN is generally a transfer of capital by the AFN to the DI (§ 312(b)). In computing a DI's transfers of capital and net transfer of capital, special rules apply to transactions between a DI's AFNs that are located in different scheduled areas (§ 505).

"Reinvested earnings" means (a) total earnings (defined in § 306(c)) of incorporated AFNs, less (b) dividends paid by incorporated AFNs to the DI and certain other AFNs, plus (c) dividends and remittances received by incorporated AFNs from certain other AFNs (§ 306 (b)).

For purposes of the regulations, each of the countries of the world is assigned to one of three "scheduled areas" (A, B, and C) (§ 319). Direct investment of a DI is generally calculated on the basis of these scheduled areas, reflecting aggregate transactions involving all AFNs located in each such area (§§ 306 and 313). Schedule A generally comprises the less-developed countries; Schedule B, certain specified developed countries; and Schedule C, the remaining countries. For certain purposes, however, direct investment allowables may be used on a worldwide rather than a schedular basis (§§ 503 and 506; see also Subpart M).

(iv) *Authorized direct investment.* Positive direct investment in AFNs is prohibited except to the extent that it is authorized either generally under the regulations or individually by specific authorization (§§ 201(a) and 801).

Subpart E (§§ 501–507) provides four direct investment allowables, one of which a DI must elect for each year (§ 502):

A worldwide minimum allowable of $1 million (§ 503);

An historical allowable for each scheduled area based on direct investment in each such area by the DI during 1965–66 (§ 504 (a));

An earnings allowable for each scheduled area based on the DI's share of AFN earnings in each such area during the preceding year (§ 504(b)); and

A $1 million alternative minimum allowable for use in Schedules B and C and a $4 million supplemental allowable for use in Schedule A (§ 507).

In general, the unused portion of an allowable (other than the §§ 503 and 507 allowables) may be carried forward to succeeding years (§§ 504 (d) and (f) and 506(d)).

Historical allowables in Schedule C or B are increased by a limited "upstream" redistribution (§ 504(c)).[1] The historical or the earnings allowables provided in § 504 and the $1 million Schedule B/C allowable provided in § 507(a)(1) may be used "downstream" (§§ 504(d) and 507(b)).

Commencing in 1970, DIs are eligible for a worldwide "incremental earnings" allowable (in addition to one of the foregoing allowables) based on the amount by which aggregate AFN earnings in a calendar year exceed the average of such earnings during 1966–67 (§ 506).

Because of considerations unique to the airlines industry, special rules for computing authorized direct investment for U.S.-flag air carriers are provided in Subpart M.

Although Canada is assigned to Schedule B, the regulations do not restrict direct investment made or liquid foreign balances held in that country (Subpart K).

(v) *Long-term foreign borrowing.* In general, direct investment in AFNs that is financed with or offset by proceeds of long-term foreign borrowing (defined in § 324) will not involve use of the DI's allowables until the borrowing is repaid. "Available proceeds" of long-term foreign borrowing (defined in § 324(d)) may be used as a deduction against a DI's net transfer of capital if expended in making transfers of capital (§ 313(d) (1)), or as an offset to positive direct investment if "allocated" in accordance with certain prescribed conditions (§ 306(e)). Proceeds that have been expended may subsequently be allocated and allocated proceeds may later be reallocated as an offset to positive direct investment in a different scheduled area (§ 203(d) (2) and (3)).

[1] "Upstream" and "downstream" refer to the relationship of one scheduled area to another. The upstream sequence is Schedule A, Schedule B, and Schedule C. The downstream sequence is Schedule C, Schedule B, and Schedule A.

Repayment of long-term foreign borrowing is generally authorized by § 1002 if the DI satisfies the applicable certification, recordkeeping and reporting requirements (Subpart J).

DIs electing a § 504 allowable may not make a positive net transfer of capital (other than one attributable to repayment of long-term foreign borrowing authorized by § 1002) resulting in positive direct investment while holding available proceeds of long-term foreign borrowing in excess of $25,000 in the form of foreign property (§ 203(d)(1)).

Subpart N (§§ 1401–1405) provides rules for the treatment of borrowings by an AFN that qualifies as an overseas finance subsidiary (OFS). Funds received by an OFS from "overseas borrowing" may be transferred to other AFNs of the DI without recognition of any transfers of capital under § 505. Moreover, proceeds of overseas borrowing lent by the OFS to the DI may be treated as available proceeds of long-term foreign borrowing and, accordingly, may be used to offset positive direct investment in any scheduled area.

(vi) *Foreign balance restrictions.* The regulations restrict the amount of assets that a DI may hold in liquid form in a foreign country other than Canada. In general, such balances may not exceed the greater of $25,000 or the average of month-end liquid foreign balances held by the DI in 1965–66 (§ 203(c)).

(vii) *Reporting requirements.* DIs are required to keep records and to submit certain reports to OFDI (§§ 203(b), 601 and 602). If the DI's interest in all AFNs is $100,000 or more or if the DI's AFNs have annual earnings of $50,000 or more, a Base Period Report (Form FDI–101) of direct investment by scheduled area during 1965–67 (and 1964 earnings for Schedule C) must be submitted, and an Annual Report (Form FDI–102F or abbreviated Form FDI–102F/S) is required to be filed within 4 months after the end of each calendar year. In addition, a DI must file Cumulative Quarterly Reports (Form FDI–102) beginning in the quarter that direct investment (positive or negative) exceeds $1 million for the year. In calculating direct investment to determine whether the quarterly reports are required, a DI must include direct investment in Canada and exclude deductions for expenditure or allocation of proceeds of long-term foreign borrowing.

Special rules apply to reporting by DIs that are members of an affiliated, family, or associated group or are owners of other DIs (§ 907).

Additional comments.

As used in this Bulletin, the terms "OFDI" and the "Office" refer generally to the Office of Foreign Direct Investments, but may also be used, for the sake of convenience, to include the Secretary of Commerce and all other persons to whom any function, duty or authority referred to in Executive Order 11387 or in the regulations has been delegated pursuant to Department Order 184–A (issued on Jan. 1, 1968), Department Order 184–B (as amended) or § 806 of the regulations.

Examples in this Bulletin involving transactions in years subsequent to 1970 are intended for illustrative purposes only, and no inference should be drawn concerning the actual amount of Subpart E and M allowables that will be available in such years. In submitting certificates described in § 1002(b), however, a DI may assume that general allowables in future years will not be less than the amounts applicable for the year in which the certificate is filed.

B201—Prohibited Direct Investment

§ B201–1 Introduction.

Section 201 sets forth the basic prohibitions on direct investment and the regulatory authority of OFDI, as derived from Executive Order 11387 of January 1, 1968. The section covers: General prohibition of positive direct investment (§ 201(a)); exclusion of financial institutions subject to the Voluntary Foreign Credit Restraint Program administered by the Board of Governors of the Federal Reserve System (§ 201(b)(2)); exclusion of transactions arising from a foreign national's interest in a U.S. business (§ 201(c)); and discretionary conditions or sanctions (§ 201(d)).

§ B201–2 General prohibition.

Section 201(a) prohibits a DI from making positive direct investment in AFNs during any year, beginning with the effective date of the regulations (Jan. 1, 1968), subject to express authorization for certain kinds and amounts of positive direct investment set forth in Subpart E (general allowables), Subpart J (repayment of borrowings), Subpart K (direct investment in Canada), and Subpart M (U.S.-flag air carriers). In addition, OFDI may permit other transactions by means of specific authorizations or exemptions, as provided in § 801.

The prohibition of § 201(a) is addressed to "positive direct investment (a technical term defined in § 306(a)(3)) during any year." This does not mean that specific transactions between a DI and an AFN are prohibited; rather, the focus is on the net effect of all transactions during a year, measured at yearend.

The term "year" normally means a calendar year. However, in certain circumstances, a DI may be specifically authorized to measure compliance with § 201(a) on the basis of a fiscal year. (See § 321.)

Example 1. DI has a wholly owned incorporated AFN (C) in Germany. During 1969, DI loans $1,200,000 to C. The loan does not violate § 201(a) at the time it is made, although the transaction constitutes a transfer of capital under § 312(a) and will be taken into account in determining the amount of direct investment made by DI in all AFNs in Schedule C for the entire year.

Example 2. DI is authorized by § 504 (a) and (c), to make positive direct investment of $1,500,000 in Schedule A during 1969. Between January 1, and December 31, 1969, DI's positive direct investment in that scheduled area is $1,700,000. DI is out of compliance (i.e., has violated § 201(a)) in the amount of $200,000.

§ B201–3 Exclusions.

(i) *Financial institutions.* Under the terms of Executive Order 11387, and as provided in § 201(b)(2), banks and nonbank financial institutions are exempt from the regulations if they are subject to the Voluntary Foreign Credit Restraint Program administered by the Board of Governors of the Federal Reserve System. Included in this category are commercial banks, bank holding companies, savings banks, trust companies and trust departments of banks, insurance companies, mutual funds, finance companies, investment bankers and brokers, pension funds, foundations and other nonprofit institutions, "Edge Act" and "Agreement" subsidiaries of commercial banks, and U.S. branches of foreign banks or nonbank financial institutions. The Federal Reserve Program calls upon such institutions to refrain from making loans or extending credit to U.S. borrowers that would "directly or indirectly" permit an outflow of funds inconsistent with the provisions and intent of the OFDI Program or making loans to foreign affiliates substituting for credit that might otherwise have been obtained abroad.

U.S. investment companies owning or establishing offshore mutual funds are subject to the Federal Reserve Program, whereas U.S. individuals owning or establishing foreign banks or nonbank financial institutions are subject to OFDI. Also, independent leasing companies and leasing affiliates of manufacturing companies are generally not included as nonbank financial institutions subject to the Federal Reserve Program.

If a U.S. financial institution that is subject to the Federal Reserve Program acquires a nonfinancial enterprise which is a DI, OFDI will continue to regulate the direct investment activities of the acquired company, and separate reporting requirements for parent and subsidiary will be maintained.

(ii) *Transfers of capital to foreign owners.* The regulations do not restrict bona fide transfers of capital or distribution of earnings to a foreign national arising from the foreign national's ownership interest in a U.S. entity.

Example 3. A U.S. corporation (X) is 50 percent owned by an Italian corporation (Y). Y is publicly owned by foreign nationals. During 1969, Y purchases $500,000 of goods on credit from X, and X pays Y a dividend of $100,000. During 1970, X is liquidated and a liquidating dividend is paid to Y. The transactions are not subject to the regulations.

§ B201–4 Reduction of authorized direct investment or of period for measuring compliance.

Section 201(d) authorizes OFDI to impose conditions on, or to reduce the amount of, authorized direct investment by a DI. Although direct investment is generally measured on an annual basis, § 201(d) gives OFDI the right to impose a shorter period for compliance purposes with respect to any DI.

Section 201(d) provides authority for administrative action by OFDI where large outflows early in a year indicate that serious violations could occur unless remedial steps are taken. The section also contains authority for appropriate sanctions in flagrant instances of disregard for the objectives of the program, such as in the case of a company that temporarily makes a large reduction in foreign investments at the very end of a year (thereby producing literal compliance with the regulations for that year) and then offsets the reduction with a major reinvestment abroad in the beginning of the following year.

B203—Liquid Foreign Balances

§ B203–1 Introduction.

Section 203 limits the amount of funds or other liquid assets that a DI may hold abroad as of the end of each month. Section 203(c) requires DIs to repatriate to the United States "liquid foreign balances" (defined in § 203(a)(2)) in excess of specified historical levels for such holdings or $25,000, whichever is greater. An exception from the repatriation requirement is made for liquid foreign balances held in Canada (§ 1105 (b)), and for available proceeds of long-term foreign borrowing that are held in the form of liquid foreign balances (§ 203(c)).

While § 203(c) refers to monthend holdings for purposes of the limitation on liquid foreign balances, it is intended that DIs should not exceed the permissible level throughout the month.

Section 203(d)(1) generally prohibits a DI electing § 504 from making a positive net transfer of capital if the DI holds available proceeds abroad as of yearend.

The provisions of § 203 also apply to foreign balances and available overseas proceeds held by an overseas finance subsidiary (OFS). See § 1403(b).

§ B203–2 Summary.

Section 203(a) defines the terms "foreign balances" and "liquid foreign balances" and provides that under certain circumstances foreign balances held by another person will be deemed held by a DI.

Section 203(b) requires a DI to keep books and records identifying proceeds of long-term foreign borrowings and the uses to which the proceeds of each such borrowing have been put.

Section 203(c) limits the amount of liquid foreign balances (other than Canadian balances or available proceeds of long-term foreign borrowing) a DI may hold at the end of any month to the greater of (1) average end-of-month balances held by the DI during 1965 and 1966 or (2) $25,000.

While available proceeds held in liquid form outside the United States are not subject to the monthend balance restrictions of § 203(c), there is a yearend restriction imposed by § 203(d)(1). Positive direct investment, to the extent attributable to a positive net transfer of capital, will not be authorized to a DI electing § 504 if the DI holds available proceeds in the form of foreign balances or foreign property as of yearend. The

restriction of § 203(d)(1) does not apply if (a) the available proceeds do not exceed $25,000; (b) the positive net transfer of capital resulted from debt repayment authorized by § 1002; or (c) the DI has elected for such year to be governed by either § 503 (minimum allowable) or § 507 (alternative minimum and Schedule A supplemental allowable). It should be emphasized that available proceeds held in the form of Canadian foreign balances or other property are not exempt from § 203(d)(1).

Section 203(d)(2) permits proceeds of long-term foreign borrowing that have been previously expended and deducted from net transfer of capital pursuant to § 313(d)(1) to be "allocated" to positive direct investment in another scheduled area. When expended proceeds are subsequently allocated, the DI must recognize a positive transfer of capital to the scheduled area in which the § 313(d)(1) deduction was previously taken; further allocation will likewise result in a transfer of capital to the scheduled area to which the proceeds were last allocated. (For a more detailed analysis of § 203(d)(2), see § 324–10.)

Section 203(d)(3 permits a DI to reallocate proceeds of long-term foreign borrowing to offset positive direct investment in a scheduled area other than that in which such proceeds were originally allocated. In such event, a transfer of capital is charged to the scheduled area to which the immediately preceding allocation was made. (For a more detailed analysis of § 203(d)(3), see § B324–10.)

§ B203–3 Definition of foreign balances.

The term "foreign balances" is defined in § 203(a)(1) to mean money on deposit in a foreign bank (including demand, time and fixed interest deposits and certificates of deposit); negotiable instruments, nonnegotiable instruments acquired after June 30, 1968, and commercial paper issued by unaffiliated foreign nationals (other than such instruments or paper acquired as a result of a DI's export of goods and services from the United States); and securities issued or guaranteed by a foreign country.

The term "money on deposit in a foreign bank" includes all bank deposits, whether interest-bearing or not, maintained with a "foreign bank" as defined in § 317(b).

The terms "negotiable instruments," "nonnegotiable instruments," "commercial paper," and "securities" include notes, bonds, debentures, drafts, bills of exchange, or other evidences of indebtedness. The physical location of such evidences of indebtedness is immaterial.

The term "securities issued or guaranteed by a foreign country" includes debt securities issued or guaranteed by any governmental unit of a foreign country, i.e., the national government, states, cities, municipalities, counties, cantons, provinces, and the like. The physical location of such securities is immaterial.

Equity interests do not constitute foreign balances. Furthermore, items such as accounts receivable not evidenced by any note or security, precious metals, jewels, jewelry, commodities futures contracts and currency futures contracts do not constitute foreign balances.

§ B203–4 Definition of liquid foreign balances.

As defined in § 203(a)(2), "liquid foreign balances" do not include:

Negotiable instruments, nonnegotiable instruments, commercial paper and securities issued or guaranteed by a foreign country acquired on or before June 30, 1968 that are not redeemable at the option of the DI and are not transferable and readily marketable;

Bank deposits, negotiable instruments, nonnegotiable instruments, commercial paper and securities issued or guaranteed by a foreign government that have a period of more than 1 year remaining to maturity when acquired by the DI and are not redeemable in full at the option of the DI within a period of 1 year after such acquisition;

Foreign balances subject to restrictions on liquidation and transfer imposed by a foreign county (i.e., exchange controls or similar restrictions); and

Foreign balances pledged or hypothecated by the DI in connection with a borrowing by the DI or by an AFN or foreign balances transferred by a DI to the extent of any transfer of capital recognized under § 312(a)(9).

For purposes of § 203(a)(2)(iv), foreign balances are deemed pledged or hypothecated if, pursuant to an express or implied agreement, the DI may not withdraw such balances while the borrowing involved remains outstanding.

The exclusion under § 203(a)(2)(iv) does not apply to any amount pledged or hypothecated in excess of the amount of the related borrowing by the DI or by an AFN.

Example 1. DI obtains a 3-year loan of $200,000 from a foreign bank and immediately expends the proceeds in an AFN. As a condition of obtaining the loan, DI is required to keep $40,000 on deposit with the foreign bank during the 3-year term. Assuming the loan constitutes a long-term foreign borrowing (as defined in § 324), this arrangement involves a $40,000 transfer of capital to the AFN in addition to the $200,000 transfer of capital resulting from investment of the loan proceeds. (See § 312(a)(9) and § B312–13.) Consequently the $40,000 deposit is not a liquid foreign balance.

Example 2. DI enters into an arrangement with a foreign bank pursuant to which DI deposits $100,000 with the bank and the bank immediately lends $100,000 to an AFN. This arrangement involves a $100,000 transfer of capital to the AFN. (See § 312(a)(9) and § B312–13.) The $100,000 deposited by DI is not a liquid foreign balance.

Example 3. DI has a 25 percent interest in a Swiss bank. In July 1970, DI deposits $100,000 with the bank to provide it with additional working capital. The deposit will not be considered a liquid foreign balance under § 203(c), but will constitute a transfer of capital under § 312(a)(2).

§ B203–5 Foreign balances deemed held by a DI.

Section 203(c) comes into effect if liquid foreign balances are "held" by a DI. A DI holds foreign balances if it has title to the securities, instruments or rights that are included within the meaning of the term, as defined in § 203(a)(1).

In addition, § 203(a)(4) establishes circumstances in which a DI is deemed to hold foreign balances even though title is vested in another person. Subparagraph (i) imputes foreign balances to a DI if they are held by any person (including an AFN) "principally formed or availed of by the DI for the purpose of holding title to such balances"; i.e., a DI having the real beneficial interest in foreign balances will be deemed to hold such balances notwithstanding that another person has nominal legal title.

Example 4. DI forms an incorporated AFN and transfers liquid foreign balances to it. The AFN does not engage in any business other than holding liquid foreign balances. Such balances are deemed to be held by DI under § 203(a)(4)(i). (Note that the transfer also constitutes a transfer of capital from DI to the AFN, pursuant to § 312(a)(2).)

Example 5. DI enters into an arrangement with an unaffiliated foreign national whereby the latter will hold title to DI's liquid foreign balances but will not use the funds itself. The liquid foreign balances are deemed to be held by DI under § 203(a)(4)(i).

Subparagraph (ii) of § 203(a)(4) imputes foreign balances to a DI even though title is held by another person (including an AFN), if the balances (or cash equivalent) are returnable to the DI on demand without material conditions and they are not reasonably related to the business needs of the holder. Foreign balances are not deemed returnable to a DI upon demand without material conditions merely because, by virtue of stock ownership, the DI controls the person holding title.

Example 6. DI has an incorporated AFN (A) engaged in manufacturing operations. From 1960 through 1968, A earned $10 million and on June 30, 1969 has $8 million invested in 6-month certificates of deposit of foreign banks. No part of these funds is needed by A to meet business requirements. Nevertheless, the foreign balances are not deemed to be held by DI, since they are not considered to be returnable to DI upon demand without material conditions.

On the other hand, assume that on June 1, 1969, A declared a $500,000 dividend in favor of DI and such dividend became payable on demand on June 15, 1969. In this event, $500,000 of the $8 million are deemed liquid foreign balances held by DI as of June 30, 1969. Note also that, since the dividend was not paid when due, a debt obligation is deemed to have been created in favor of DI resulting in a $500,000 transfer of capital by DI to A under § 312(a)(1). Accordingly, payment of the past due dividend will constitute a transfer of capital from A to DI pursuant to § 312(b)(3).

Example 7. DI has 50 percent interest in a German company (C). In June 1969, DI lends $100,000 to C, repayable on demand. The $100,000 is invested by C in a 6-month certificate of deposit of a foreign bank. C does not need any part of the $100,000 to meet business requirements. The certificate of deposit is deemed to be held by DI. (Note also that the loan would constitute a transfer of capital from DI to C pursuant to § 312(a)(1).)

Determining whether liquid foreign balances held by an AFN are "unrelated to the business needs" of the AFN requires analysis of all facts and circumstances of the particular case. The nature of the AFN's business and customary holdings of liquid funds are relevant factors. As a general rule, liquid foreign balances held by an AFN will not be consid-

ered unrelated to its business needs if required to pay current operating expenses (including tax, royalty, interest, and similar obligations), to pay for reasonably current or planned capital improvements or additions, or as standby contingency reserves.

Example 8. DI has a wholly owned subsidiary in Mexico (A) engaged in manufacturing operations. A holds $1 million in liquid foreign balances as of June 30, 1969, of which only $250,000 may reasonably be required for working capital purposes. However, A has entered into a contract for expansion of facilities and plans to expend the remaining $750,000 in 1969 and 1970 for this purpose. The liquid foreign balances held by A are, therefore, related to business needs and are not treated as liquid foreign balances of DI under § 203(a)(4) even if returnable to DI upon demand without material conditions.

Example 9. DI has a wholly owned subsidiary (C) in Germany engaged in manufacturing operations. As of June 30, 1969, C holds liquid foreign balances of $1 million. C requires only $250,000 of this amount for working capital purposes, and intends to lend the remaining $750,000 from time to time to other AFNs on a short-term basis. Accordingly, $750,000 of the liquid foreign balances held by C are unrelated to its business needs and will be treated as liquid foreign balances of DI under § 203(a)(4)(ii) if they are returnable to DI upon demand without material conditions.

Although a DI may have nominal title to foreign balances used by an unincorporated AFN for its ordinary business operations, the DI will be deemed to hold such balances only if the conditions of § 203(a)(4) are met.

Example 10. DI has a branch in the United Kingdom (B) engaged in manufacturing operations. For many years, B has maintained an account averaging $500,000 with a local bank. As of June 30, 1969, B's account with the local bank has a balance of $500,000, related to its business needs. Thus, although the $500,000 is deemed returnable to DI upon demand without material conditions because B is a branch, the liquid foreign balances are not attributable to DI under § 203(a)(4).

Example 11. DI has a branch in the United Kingdom (B) engaged in manufacturing operations. For many years, B has maintained an account averaging $500,000 with a local bank. However, as of June 30, 1969, B's balance in the account is $1 million. B has recently been expanding business at a rapid pace and estimates that, for the remainder of 1969 and thereafter, it will have to maintain cash balances of at least $1 million in order to meet increased operating commitments. The liquid foreign balances held by B are related to business needs and, therefore, are not treated as liquid foreign balances of DI under § 203(a)(4), even though returnable to DI upon demand without material conditions.

Example 12. An individual (X) who is a "person within the United States" owns a substantial apartment house complex in France. As a result, X is a DI and the apartment house complex is his AFN. X also owns a chalet in France purchased principally for his own personal use, although he and his family reside there only from June through August each year. During the remainder of the year, X and his family reside in the United States and the chalet is rented on a month-to-month basis to others. The chalet is not an AFN of X.

X maintains two demand accounts with French banks. The funds in one account (account No. 1), consisting principally of the income earned from the apartment house complex, are needed and utilized to pay the operating expenses of the apartment house complex and for repairs and improvements to this property. Operating expenses of the chalet and the cost of repairs and improvements to this property are paid out of the second account (account No. 2), but the principal use of this account is for X's personal expenses when he resides in France. The funds in account No. 1 are not liquid foreign balances of X, as they are related to the business needs of X's AFN (i.e., the apartment house complex); the funds in account No. 2 are liquid foreign balances of X, since their principal use is not for business needs.

Foreign balances held in liquid form by an OFS are to be included in the computation of liquid foreign balances held by a DI for purposes of § 203(c). See § 1403(b).

§ B203–6 Valuation of foreign balances.

Negotiable instruments, nonnegotiable instruments, commercial paper and securities constituting foreign balances shall be valued, for purposes of § 203, at fair market value, or, if fair market value is not readily determinable, at the cost of acquisition. In the case of items the prices of which are quoted on a daily basis, the final bid price (or the closing sale price, if available) on the relevant date will be considered the fair market value on such date.

Foreign balances in the form of bank deposits or other claims denominated in a foreign currency are valued at the current exchange rate in terms of U.S. dollars.

§ B203–7 Limitation on amount of liquid foreign balances.

Section 203(c) requires a DI to limit the amount of liquid foreign balances (other than Canadian foreign balances and available proceeds of long-term foreign borrowing held in the form of liquid foreign balances) held as of the end of any month to the greater of (1) average end-of-month amounts held during 1965 and 1966 (i.e., the sum of liquid foreign balances held on the last day of each month during 1965 and 1966 divided by 24) or (2) $25,000.

As provided by §§ 203(c) and 1105(b), Canadian foreign balances are not subject to the limitations of § 203(c) and can be held by a DI (or an AFN) without restriction on amount (subject, however, to the yearend repatriation requirement in § 203(d)(1) for available proceeds held in the form of liquid foreign balances).

Section 1105(b) excludes Canadian balances from the calculation of total liquid foreign balances for purposes of the $25,000 exemption under § 203(c)(2). The parenthetical reference to "direct investment liquid foreign balances" in § 1105(b) is intended merely to reflect the exclusion of available proceeds of long-term foreign borrowing (as defined in § 324(d)) from the restrictions of § 203(c). It is not the intention of § 1105(b) to authorize inclusion of available proceeds held in Canada during 1965 and 1966 for purposes of calculating average end-of-month liquid foreign balances under § 203(c).

Section 203(c) also permits a DI to hold available proceeds of long-term foreign borrowing in the form of liquid foreign balances subject only to the limitation in § 203(d)(1). "Proceeds of long-term foreign borrowing" and "available proceeds" of long-term foreign borrowing are defined in § 324 (c) and (d).

Calculations under § 203(c) are to be made on a worldwide rather than on a schedular basis. Accordingly, a DI may transfer liquid foreign balances from one foreign country to another, but the aggregate amount held abroad at the end of any month may not exceed the amount permitted by § 203(c).

Example 13. DI held liquid foreign balances (other than Canadian foreign balances and available proceeds of long-term foreign borrowing) of $200,000 on March 31, 1965, $200,000 on April 30, 1965, $100,000 on May 31, 1965, $400,000 on April 30, 1966, and $300,000 on May 31, 1966. DI held no liquid foreign balances of any kind as of the end of any other month during 1965 or 1966. Therefore, DI may hold $50,000 of liquid foreign balances (other than Canadian liquid foreign balances and available proceeds of long-term foreign borrowing held in the form of liquid foreign balances) as of the end of any month commencing June 30, 1968 (i.e., $1,200,000 divided by 24).

Example 14. DI did not hold any liquid foreign balances during 1965 or 1966. Nevertheless, DI may hold up to $25,000 in liquid foreign balances (other than Canadian liquid foreign balances and available proceeds held in the form of liquid foreign balances). See § 203(c)(2).

Example 15. DI held liquid foreign balances during 1965 and 1966, but all were Canadian foreign balances. DI may not hold more than $25,000 of liquid foreign balances (other than Canadian liquid foreign balances and available proceeds held in the form of liquid foreign balances) as of the end of any month.

Only available proceeds of long-term foreign borrowing (i.e., borrowings reported on appropriate records and OFDI reporting forms, the proceeds of which have not been expended or allocated) and proceeds of foreign borrowing made on or after May 1, 1970 in anticipation of refinancing another foreign borrowing or long-term foreign borrowing (see § B324–5(i)) may be held in the form of liquid foreign balances outside the limitations of 203(c). Note, however, that if a DI does not properly report the borrowing as a long-term foreign borrowing, then the funds received, if held as liquid foreign balances, will be subjet to the restrictions of 203(c). (See §§ B203–8(i) and B324–6 and 7.)

Once available proceeds are either expended in making transfers of capital (and deductions taken under § 313(d)(1)) or are allocated to offset positive direct investment pursuant to § 306(e), such funds cease to be available proceeds and will not qualify for the exemption contained in § 203(c). Moreover, § 306(e) provides that available proceeds allocated to positive direct investment may not thereafter be held in the form of foreign balances or foreign property, liquid or otherwise.

Example 16. On May 1, 1969, DI negotiates a $1 million long-term foreign borrowing, the proceeds of which are placed in a demand deposit with a London bank. The

proceeds are available proceeds of long-term foreign borrowing, and may be held in the form of liquid foreign balances outside the limitations of § 203(c). On June 1, 1969, DI withdraws $600,000 from the London bank and loans the funds to a French AFN (C) on a 60-day note. The loan is a transfer of capital from DI to C, but since proceeds of long-term foreign borrowing were used, an amount equal to the transfer of capital must be deducted under § 313(d)(1). In July 1969, C repays the $600,000 loan. DI now holds $600,000 of proceeds of long-term foreign borrowing that are not available proceeds of such borrowing since they were expended in making the loan to C. Therefore, if the $600,000 is again placed on deposit with the London bank, it would have to be included in the computation of liquid foreign balances held by DI under § 203(c). On December 30, 1969, DI withdraws $400,000 from the London bank and repatriates the funds to the United States for the purpose of allocating such proceeds to positive direct investment in Schedule B pursuant to § 306(e). If the criteria of § 306(e) for allocation are met, the $400,000 could not thereafter be held in the form of foreign balances or any other foreign property.

Example 17. During 1970, DI's international finance subsidiary issues $30 million of debentures convertible into the stock of the DI. The borrowing qualifies as long-term foreign borrowing under § 324 and DI receives $29 million, after payment of underwriting and legal expenses, which DI deposits in a foreign bank. Since DI has $30 million of available proceeds under § 324, DI may transfer $1 million of funds to the bank account and designate (on its books and records reflecting proceeds of long-term foreign borrowing) such funds as available proceeds for purposes of § 203(c). Note that the funds so designated will be treated as available proceeds for all purposes of the regulations, including § 203(d)(1).

§ B203–8 Available proceeds of long-term foreign borrowing: Effect on positive net transfer of capital.

Section 203(d)(1) prohibits a DI that elects a § 504 allowable pursuant to § 502 and holds more than $25,000 of available proceeds of long-term foreign borrowing in the form of foreign property at yearend from making a positive net transfer of capital to any scheduled area, to the extent such positive net transfer of capital would result in positive direct investment for such year, unless the positive direct investment is authorized by § 1002. Section 203(d)(1) does not apply to DIs electing the § 503 or § 507 allowables. The effect of § 203(d)(1) is to require use of available proceeds of long-term foreign borrowing, in whatever form held, for direct investment purposes before such investment is financed with funds from U.S. sources.

For purposes of § 203(d)(1), a DI need not take into account positive direct investment that occurs by reason of inter-schedular transfers of capital charged against an allowable "downstreamed" pursuant to § 504(d). Under § 505, transfers of capital between AFNs in different scheduled areas are attributed to the DI. Under § 504(d), a DI is permitted to "downstream" unused schedular allowables without limitation. Accordingly, circumstances may arise where, by reason of § 505, positive direct investment charged to a DI in a scheduled area will be authorized only by application of § 504(d). If, as of yearend, the DI holds available proceeds, such positive direct investment would be prohibited by a literal application of § 203(d)(1). However, OFDI construes § 203(d)(1) as being inapplicable to positive direct investment arising from a § 505 transfer of capital that is charged against a DI's § 504(d) allowable.

(i) *Available proceeds held in the form of foreign property.* The prohibitions of § 203(d)(1) apply during any year only if the DI holds available proceeds of long-term foreign borrowing in the form of foreign balances or other foreign property as of the end of such year. The term "available proceeds of long-term foreign borrowing" is defined in § 324(d) to mean the proceeds of long-term foreign borrowing remaining after deducting (a) amounts expended in making transfers of capital to AFNs (other than Canadian AFNs) and deducted from net transfer of capital under § 313(d)(1) and (b) amounts allocated to and deducted from positive direct investment in any scheduled area (other than positive direct investment in Canada) under § 306(e). If a DI does not report a long-term foreign borrowing on all required periodic reports following the borrowing, the proceeds cannot be treated as available proceeds and, therefore, are not subject to the prohibitions of § 203(d)(1). (See § B324–6 and 7.) Note also that the proceeds of an unreported borrowing do not qualify for use as a deduction from net transfer of capital under § 313(d)(1) or from positive direct investment under § 306(e), nor can such proceeds be excluded in computing liquid foreign balances for purposes of § 203(c).

The prohibitions of § 203(d)(1) apply if available proceeds are held in any form of foreign property, including Canadian foreign balances or other Canadian property, and debt or equity securities of a foreign national (including debt or equity securities of a Canadian person, whether or not such Canadian person is an AFN of the DI).

For purposes of the following examples, assume that DI elects the § 504(a) historical allowable and has historical allowables of $3 million in Schedule A, $2 million in Schedule B and $1 million in Schedule C:

Example 18. In June 1970, DI negotiates a long-term foreign borrowing of $10 million. The borrowing is not reported in DI's second quarter report on Form FDI–102 because the proceeds were intended for use in the United States. DI repatriates $8 million to the United States for immediate use and purchases 6-month certificates of deposit of a London bank with the remaining $2 million. DI has not made and does not make during 1970 any other long-term foreign borrowings. As of the end of 1970 DI has made a positive net transfer of capital to Schedule A of $2,500,000. The positive net transfer of capital is not prohibited by § 203(d)(1); DI has no available proceeds because the borrowing was not reported as provided in § 324(c). Note, however, that the 6-month certificates of deposit are liquid foreign balances, subject to the limitation of § 203(c).

Example 19. In March 1970, DI negotiates a long-term foreign borrowing of $10 million, immediately expends $5 million of the proceeds in a transfer of capital to a Schedule C AFN and purchases 6-month certificates of deposit of a London bank with the remaining $5 million. DI reports the borrowing on Form FDI–102 for the first quarter of 1970 pursuant to § 324(c). Upon maturity of the certificates of deposit in September, DI withdraws the funds (constituting "available proceeds") and deposits them with a New York bank. During November, DI makes a transfer of capital to Schedule A of $2,500,000, but not with the available proceeds, resulting in a positive net transfer of capital to Schedule A at the end of 1970 of $2,500,000. The positive net transfer of capital to Schedule A is not prohibited by § 203(d)(1) because DI does not hold, as of the end of the year, any available proceeds in the form of foreign property.

Example 20. In December 1969, DI negotiated a long-term foreign borrowing of $15 million, reported the borrowing as required by § 324(c), and invested $10 million in 13-month certificates of deposit of a London bank. During 1970 DI makes a $2 million positive net transfer of capital to Schedule A and a $1 million positive net transfer of capital to Schedule B. Both positive net transfers of capital are prohibited by § 203(d)(1), since DI had available proceeds held in the form of foreign property on December 31, 1970 (i.e., the 13-month certificates of deposit of the London bank).

Example 21. During 1970, DI negotiates and properly reports a $10 million long-term foreign borrowing and loans the proceeds to a Canadian AFN under a 5-year note. DI also makes a $2 million positive net transfer of capital to Schedule A. Assuming no other transactions, the positive net transfer of capital to Schedule A is prohibited because DI holds available proceeds of long-term foreign borrowing in the form of debt obligations of a foreign person; i.e., the Canadian AFN. (DI could, however, avoid noncompliance with § 203(d)(1) by allocating and repatriating, pursuant to § 306(e), $2 million of the available proceeds to offset the positive direct investment in Schedule A.)

Example 22. During 1970, DI's only AFN, a branch in Schedule C, increases net assets by $1 million. By operation of § 313(b), DI is deemed to have made a $1 million positive net transfer of capital to Schedule C. DI has $2 million of available proceeds of long-term foreign borrowing and such proceeds are invested in short-term foreign government securities. During the final quarter of 1970 DI allocates $1 million of these proceeds to the positive net transfer of capital to Schedule C, liquidates that amount of foreign securities, repatriates the funds received, and deposits them in a U.S. bank. As of the end of 1970, DI does not have a positive net transfer of capital to Schedule C, and therefore DI is not affected by § 203(d)(1). Note that DI will carry over into 1971 $1 million of available proceeds that are not subject to the repatriation requirements of § 203(c).

(ii) *Positive net transfer of capital authorized by § 503, § 507 or § 1002.* Section 203(d)(1) does not prohibit a DI holding available proceeds at yearend from making a positive net transfer of capital resulting in positive direct investment if the DI has elected to be governed by § 503 or § 507, nor does that prohibition apply to a positive net transfer of capital authorized by § 1002 (resulting from the repayment of debt).

Example 23. DI has § 504 allowables for 1969 of $500,000 in Schedule A, $300,000 in Schedule B and $100,000 in Schedule C. During 1969, DI negotiates and properly reports a long-term foreign borrowing of $10 million. DI expends $6 million to acquire a Schedule C AFN and invests the remaining

$4 million in 6-month certificates of deposit of a London bank. DI thereafter makes a positive net transfer of capital of $750,000 to Schedule A. DI elects to be governed by the § 503 allowable for 1969. The positive net transfer of capital to Schedule A is not prohibited by § 203(d)(1), even though DI holds available proceeds in the form of foreign balances at the end of 1969.

Example 24. During 1967, DI negotiated a long-term foreign borrowing of $15 million and expended all proceeds to acquire a Schedule B AFN. The terms of the borrowing called for repayment of principal in the amount of $2,500,000 in each of 1969, 1970, and 1971, the remainder being due in 1972. DI has a § 504 allowable in Schedule B of $2 million for 1969. During 1969, DI acquires available proceeds from a second long-term foreign borrowing. The proceeds of this borrowing are held in a demand account with a foreign bank. During 1969, DI makes the first required repayment of the 1967 borrowing as authorized by § 1002(a)(4), and there are no other relevant transactions during the year. The positive net transfer of capital resulting from the repayment is not prohibited by § 203(d)(1).

(iii) *Positive net transfer of capital prohibited only if positive direct investment results.* A DI holding available proceeds in the form of foreign balances or property at yearend is prohibited by § 203(d)(1) from making a positive net transfer of capital to a scheduled area only to the extent such transfer results in positive direct investment.

For purposes of the following examples, assume that DI has elected a § 504 allowable and that more than $25,000 in available proceeds of long-term foreign borrowing are held in the form of foreign property.

Example 25. DI has five Schedule C AFNs, all incorporated, and the AFNs have total losses of $3 million during 1969. During 1969, DI makes a positive net transfer of capital to these Schedule C AFNs of $2,500,000. The positive net transfer of capital is not prohibited by § 203(d)(1) because it does not result in positive direct investment. (Section 504(e), which requires total losses in Schedule C to be excluded from the calculation of direct investment in Schedule C is not applicable to § 203(d)(1).) The result would be the same if the AFNs and the positive net transfer of capital were in Schedule A or B.

Example 26. DI has five Schedule C AFNs, all incorporated, that have aggregate earnings of $4 million during 1969, but declare dividends to DI of $5,500,000. During 1969, DI makes a positive net transfer of capital to Schedule C of $1 million. The positive net transfer of capital is not prohibited by § 203(d)(1), because it does not result in positive direct investment in Schedule C.

(iv) *Allocation or reallocation to positive direct investment deemed first to reduce positive net transfer of capital.* Section 203(d)(1) provides that any allocation to positive direct investment pursuant to § 203(d)(2), § 203(d)(3), or § 306(e) shall be deemed, for purposes of § 203(d)(1), first to reduce the positive net transfer of capital component of positive direct investment. Accordingly, an allocation that serves to offset positive direct investment in a scheduled area for purposes of conforming to a DI's § 504 allowable may also be availed of for purposes of satisfying the requirement of § 203(d)(1).

Example 27. DI elects the 30 percent earnings allowable under § 504(b) for 1969, resulting in a Schedule B allowable of $2 million. During 1969, DI makes a positive net transfer of capital to Schedule B of $2,500,000 and its Schedule B AFNs earn $1 million. In addition, DI holds $5 million in available proceeds of long-term foreign borrowing in the form of short-term deposits in a German bank. DI's Schedule B AFNs pay no dividends during 1969. DI must repatriate $1,500,000 of the available proceeds prior to the end of the year and allocate and deduct such amount from positive direct investment pursuant to § 306(e) to stay within the limits of § 504(b). However, since DI would still hold $3,500,000 of available proceeds in the form of foreign balances, and the net transfer of capital to Schedule B, after taking into account the second proviso to § 203(d)(1), would be $1 million ($2,500,000 less $1,500,000), DI is also required to allocate before the end of the year at least an additional $1 million to comply with § 203(d)(1). If this repatriated amount is allocated to positive direct investment under § 306(e), DI will report on its Form FDI-102F positive direct investment of $1 million in Schedule B during 1969 (deemed to consist of a zero net transfer of capital plus reinvested earnings of $1 million) and would have a Schedule B carryforward into 1970 of $1 million for its unused allowable in that amount. As an alternative to allocation, DI may repatriate the remaining $3,500,000 of available proceeds from abroad and hold them in nonforeign assets. Section 203(d)(1) would not then apply and DI would show positive direct investment in Schedule B of $2 million, no carryforward of the § 504 allowable and $3,500,000 of available proceeds for use in succeeding years.

(v) *Application to overseas finance subsidiaries.* As provided by § 1403(b)(2), available overseas proceeds held by an OFS are deemed, for purposes of § 203(d)(1), to be available proceeds of long-term foreign borrowing held by the DI.

(vi) *Specific exemption from the prohibitions of § 203(d)(1).* A DI subject to the prohibitions of § 203(d)(1) may comply with the requirements of the section in any of three ways: (a) The DI may expend available proceeds of long-term foreign borrowing in making transfers of capital, so as to avoid having a positive net transfer of capital in any scheduled area; (b) the DI may allocate available proceeds of long-term foreign borrowing to positive direct investment in each scheduled area, to the extent of a positive net transfer of capital in each scheduled area; or (c) the DI may repatriate all available proceeds of long-term foreign borrowing to the United States by yearend. Compliance with § 203(d)(1) may, however, be impossible or may result in substantial hardship in certain instances. OFDI will consider applications for specific exemption from § 203(d)(1) upon showing by a DI that compliance with that section cannot be accomplished by any of the means listed above, for one or more of the following reasons:

The expenditure of available proceeds in making positive transfers of capital during the year and the liquidation and repatriation to the United States of available proceeds would contravene express representations made by the DI to, or restrictions imposed on the DI by, persons from whom the relevant long-term foreign borrowings were obtained (as conditions to obtaining such borrowings);

Available proceeds cannot be expended in making positive transfers of capital or repatriated to the United States, because they were invested in nonliquid long-term foreign investments prior to June 18, 1969;

The expenditure of available proceeds in making positive transfers of capital during the year and the liquidation and repatriation to the United States of available proceeds would create a substantial probability of material adverse United States or foreign tax consequences to the DI (such as jeopardizing the exemption of an international finance subsidiary's interest payments on debt issued to foreign persons from U.S. withholding tax because of an increase in U.S. source income of the international finance subsidiary); or

Available proceeds cannot be expended in making positive transfers of capital or repatriated to the United States without causing demonstrable, material economic hardship for the DI (generally, market yield differentials will not be considered sufficient grounds for such hardship relief).

DIs should note Internal Revenue Service Technical Information Release No. 1005, issued December 27, 1968 (Rev. Rul. 69-27), in which there is discussion of several options available under §§ 861-864 of the Internal Revenue Code (1954) that are consistent with the objectives and requirements of the Foreign Direct Investment Program and will not adversely affect an international finance subsidiary's "foreign-source income" position.

B304—Affiliated Foreign Nationals

§ B304-1 Introduction.

Only persons within the United States who are or who become DIs by virtue of their interests in affiliated foreign nationals (AFNs) are subject to the program.

As a general rule, a transaction between a person within the United States and a foreign national (as defined in § 302) that does not affect the U.S. person's equity or debt investment in an AFN, or does not result in a foreign national becoming an AFN, is not subject to the direct investment prohibitions imposed by § 201(a) of the regulations.

§ B304-2 Summary.

Restrictions on foreign direct investment under the program are applicable only to persons within the United States having or acquiring, directly or indirectly, a 10 percent or greater interest in an affiliated foreign national. A "foreign national" is defined in § 302(a) as—

> * * * any person which is not a person within the United States * * *, including a corporation or partnership organized under the laws of a foreign country * * *, a business venture conducted within a foreign country * * *, and a foreign bank * * *.

The interest in a foreign national required to make it an AFN for purposes of the regulations is, in general, determined by the U.S. investor's voting rights if the foreign national is a corporation, or by the share of profits to which the investor is entitled if an unincorporated foreign business activity is involved.

Nonprofit foreign nationals, such as charitable, educational, religious, scientific, literary, or similar organizations, are not treated as AFNs.

Business ventures in which an AFN has an interest may themselves be AFNs if located in a scheduled area other than that of the parent. Canadian business ventures of AFNs located in Schedule B and non-Canadian, Schedule B business ventures of Canadian AFNs are treated as separate AFNs, even though such relationships within the same scheduled area would ordinarily result in a single AFN.

§ B304–3 **Requisite financial interest.**

The interest that will give rise to a DI–AFN relationship is, generally, a 10 percent or greater voting interest in a foreign corporation or a 10 percent or greater interest in the profits of a foreign partnership or business venture. (See §§ 304(b)(2), 901 and 902). However, § 304(b)(4) provides that a DI–AFN relationship may be deemed to exist notwithstanding this general rule. Under present OFDI policy, this caveat applies principally to cases where the U.S. investor actually participates in and exercises a controlling interest over the affairs of the foreign national, and has transferred funds or other property in excess of $200,000 to the enterprise during any year commencing with 1968.

A relationship which is solely that of debtor and creditor is not subject to the 10-percent interest test (whether or not the loan is secured), even though principal and/or interest payments by the foreign borrower may result in the U.S. creditor receiving all or a substantial portion of the foreign enterprise's revenues.

§ B304–4 **Foreign nationals.**

(i) *Corporations.* A foreign corporation includes any organization incorporated under the laws of a foreign country, or having all or a substantial part of the legal characteristics commonly attributed to corporations under the laws of the United States (§ 307(b)). Thus, an organization that is not formally incorporated under foreign law but (a) has transferable interests, (b) is organized so that holders of interests are not liable for its obligations except to the extent of their contributions or subscriptions, and (c) has perpetual duration (or for a substantial fixed period), would be considered a foreign corporation.

Pursuant to § 304(b)(1), an incorporated AFN is generally assigned to the scheduled area where organized, regardless of the situs of operations. However, if the AFN conducts no operations in the scheduled area of incorporation but merely maintains a required statutory office there, it may be assigned to a different scheduled area for purposes of the regulations (§ 304(b)(4)).

(ii) *Partnerships.* A foreign partnership includes formally structured noncorporate organizations created under a partnership law or similar statute of a foreign country. A foreign joint venture will ordinarily be treated as a "business venture" (see below), rather than as a partnership, if it is formed to engage in a specific transaction or series of related transactions and is to be liquidated when the transaction or transactions have been completed.

A foreign partnership is assigned to the scheduled area where it is organized (§ 304(b)(1)).

(iii) *Business ventures.* A foreign business venture encompasses business activities in a foreign country (a) by a DI, (b) by employees or partners of a DI on behalf of the DI, or (c) by employees or partners of an AFN on behalf of such AFN (§ 304(a)(1) (ii) and (iii), as limited by § 304 (c) and (d)). Some types of facilities abroad, such as storage areas and display offices owned or physically controlled by the DI, may be treated as business ventures for purposes of the regulations even though frequently not considered "permanent establishments" for other legal purposes.

The term "employee" as used in § 304 is not necessarily synonymous with its meaning for Federal tax purposes. For example, an agent working substantially full-time for a U.S. principal and having a stock of goods from which orders are filled, or having authority to accept orders or otherwise execute contracts on behalf of his principal, may be considered an employee for purposes of this section. Furthermore, the agent's lack of authority to conclude contracts may be immaterial if acceptance by the DI is, in actual practice, merely a ministerial act.

Ownership interests in real property abroad (excluding mortgages secured by real property) will constitute business ventures if held primarily for business purposes (including real property held for appreciation). Therefore, crop or grazing acreage, apartment houses and land held for subdivision are considered business ventures. On the other hand, real property such as a house in a foreign country purchased by a U.S. resident principally for personal use will not be considered held for business purposes even though rented to others for a portion of the year.

Contract construction, engineering, oil exploration, and similar operations involving a jobsite or project office in a foreign country are also business ventures. Drilling operations on the U.S. continental shelf or geological drilling in the deep ocean over which no nation asserts jurisdiction are deemed to be conducted within the United States for purposes of the regulations, while drilling operations conducted on the continental shelf adjacent to a foreign country are deemed to be conducted in that country. While drilling operations over water are in all other respects treated the same as drilling operations on land, vessels registered in the United States that are used in connection with such operations in the jurisdiction of a foreign country are assigned a value of zero (and related liabilities or depreciation charges should be excluded) in computing net branch assets of that business venture.

Under § 304(a) (1) (ii), a DI's overseas branch is a business venture, whether or not the DI customarily maintains separate books and records reflecting the assets, liabilities, earnings, and expenses, etc. attributable or allocable to the branch. Similarly, a branch of an incorporated AFN is a foreign business venture, unless located in the same scheduled area as the parent AFN. In such case the parent and its business venture are grouped as a single AFN for purposes of the regulations, provided neither is Canadian (§ 304(a)(1)(i), as qualified by § 304(a)(1)(iii)). If the parent AFN and its business venture are in different scheduled areas, or if in the same scheduled area and one is Canadian, two AFNs would be attributed to the DI (§ 304 (a)(1)(iii)).

Under § 304(b)(1), certain nonpermanent or transient business ventures conducted in more than one scheduled area during any year are assigned to the scheduled area in which the business venture is conducted for the greatest period of time during such year. Thus, for example, a traveling circus performing for short periods of time during a given year in a number of countries in different scheduled areas, but primarily in Schedule C countries, will be treated as a Schedule C AFN for that year.

§ B304–5 **Specific exceptions.**

Section 304 (c) and (d) enumerate certain categories of foreign business activities that are not treated as AFNs regardless of the interest that a person within the United States may have or may acquire. Excepted are foreign enterprises solely of a charitable, educational, religious, scientific, literary, or similar nature not engaged in for profit. Also excepted from treatment as AFNs during a given year are business ventures that (a) do not have or involve, at any time during the year, gross assets of more than $50,000 valued at the greatest of cost, book, replacement, or market (§ 304 (d)(i)); (b) are commenced during the year and are not reasonably expected to be conducted for more than 12 consecutive months (§ 304(d)(ii)); or (c) are terminated within the year and were not, in fact, conducted for more than 12 consecutive months (§ 304(d)(iii)).

The test under § 304(d)(i) relates to gross assets determined in accordance with accounting principles generally accepted in the United States. If, at any time during the year, the business venture has gross assets of more than $50,000, it is deemed an AFN for the entire year.

The determination whether a business venture in a foreign country is reasonably expected to be conducted, or is in fact conducted, for a period of 12 consecutive months, under § 304(d) (ii) and (iii), is governed by the primary activity of the enterprise during such period. Continuous physical presence is not required. If, for example, a traveling circus spent substantially all of the requisite 12-month period abroad, but returned to the United States occasionally for appearances, the business venture would nevertheless be considered to have been conducted within one or more foreign countries for more than 12 consecutive months.

With specific reference to contract construction, engineering, and similar operations conducted directly by U.S. companies involving opening of a job site and/or project office in a foreign country (or in waters under the jurisdiction of a foreign country), the following rules will generally be applied under § 304(d) (ii) and (iii):

The commencement date of the business venture is the date on which the first materials or equipment arrive at the job site, or the date the project office is opened, whichever is earlier; and

The termination date of the business venture is the date when all transfers of capital and earnings attributable to the relevant contract (except for guaranty retentions of a reasonable amount) are charged off the job's books and repatriated to the United States. (Payments under guaranty retentions should be charged off and the balance repatriated to the United States as soon as practicable.)

A determination under § 304(d)(ii) whether an overseas business venture is reasonably expected to be conducted for more than 12 consecutive months should be based on the facts and circumstances existing when the venture is commenced. Determinations need not anticipate delays or interruptions that are not foreseeable when the venture is commenced, such as delays or interruptions due to unanticipated labor strikes or slowdowns or unusual weather conditions.

The rule with respect to termination of a business enterprise during any year under § 304(d)(iii) is not intended to be applied inflexibly. If, due to unforeseeable delays or interruptions, a business venture cannot be terminated within the required 12-month period, but is in fact terminated with reasonable dispatch in view of the unanticipated difficulties, a specific exemption from application of the regulations may be granted (see § 801).

If an exemption under § 304(d) is applicable to a business venture owned directly by a DI (e.g., a branch of the DI), the venture is not considered to be an AFN of the DI. Therefore, transfers of capital between the DI and the venture have no effect under the regulations, nor do profits (or losses) of the venture. The result is different, however, if an exemption under § 304(d) applies to an AFN's business venture that is located in a different scheduled area from the AFN. Section 304(d) then merely serves to exclude the venture as an AFN of the DI, not to remove it from the reach of the regulations altogether. Ventures of this nature are deemed a part of the parent AFN (as are an AFN's business ventures in the same scheduled area). Accordingly, profits (or losses) of an incorporated AFN's ventures of this nature would be deemed earnings of the parent AFN, transfers of capital to the venture would be deemed transfers to the parent AFN, and any net change in the net assets of the venture would not be reflected in calculating the DI's net transfer of capital to unincorporated AFNs for purposes of § 313(b).

§ B304–6 Application of § 304.

The operation and effect of § 304 are illustrated by the following examples:

Example 1. (*General.*) A U.S. corporation (X) owns 10 percent of the outstanding voting stock of a corporation organized under the laws of France. The foreign company is an incorporated AFN in Schedule C (see § 304 (a)(1)(i) and (b)(1)). If the company were incorporated under the laws of Brazil, it would be an incorporated AFN located in Schedule A. If it were incorporated under the laws of the United Kingdom, it would be an incorporated AFN located in Schedule B.

If the French AFN has a branch in Italy, or if the AFN in the United Kingdom has a branch in Japan, the branch operations would be subsumed under the parent company for purposes of the regulations, since both parent and branch would be in the same scheduled area (§ 304(a)(1)(i)). An exception to this rule applies where either the parent AFN or its branch is located in Canada, in which case both would be AFNs (§ 304(a)(1)(iii)).

By the same token, if the French corporation has a branch in Germany and a wholly-owned corporate subsidiary in Australia, and the latter has a branch in Canada, DI would have only three AFNs; (a) The French corporate subsidiary, (b) the French corporation's Australian subsidiary, and (c) the latter's Canadian branch. The French AFN's branch in Germany would not be a separate AFN, since Germany and France are in the same scheduled area. The Canadian branch would be a separate AFN since, for purposes of § 304(a)(1)(iii), Canada is not deemed to be a Schedule B country.

Example 2. (*Voting interest test.*) A U.S. corporation owns 95 percent of the outstanding voting stock of a company in France, the remainder being owned by unaffiliated foreign nationals. The French company has a 10 percent direct interest in a corporation in Japan. Only the French company is an AFN, since X's indirect interest in the Japanese company is only 9.5 percent, i.e., 95 percent ×10 percent (see §§ 901, 902).

Example 3. (*Profit interest test.*) An individual (X) who is a person within the United States is a partner in a partnership (C) organized under the laws of Germany, although he is not actively engaged in C's business. Under the partnership agreement, X is entitled to receive 15 percent of the profits of C. C is an unincorporated AFN of X (see § 304 (a)(1)(i) and (b)(1)).

Example 4. (*Indirect profit interest through non-AFN parent.*) A French corporation (C) has 200,000 shares of stock outstanding, 100,000 of which are voting and 100,000 of which are nonvoting fixed-divided preferred. C has numerous branches in Schedules A and B. For many years, substantially all of C's profits (including branch profits) have been distributed as dividends to holders of the preferred stock and no dividends have been paid on the common stock. A corporation in the United States (X) owns 8,000 shares of C's voting stock (8 percent) and 70,000 shares of the preferred stock (70 percent); however, this investment has not been accompanied by active participation in or control over C's business affairs. C is not an AFN of X. Moreover, although X has for many years received more than 10 percent of the profits of C's Schedule A and B branches, in the form of preferred stock dividends from C, OFDI would not consider the branches to be AFNs. A foreign business venture owned directly by a foreign corporation or partnership is not treated as an AFN of a U.S. person unless the parent is also an AFN of the U.S. person.

Example 5. (*Exception to the 10 percent interest test.*) A U.S. corporation (X) owns 9 percent of the outstanding voting stock of a French corporation (C). X also owns a current option to acquire additional voting stock of C that, if exercised, would give X ownership of 35 percent of C's outstanding voting stock. Moreover, a majority of C's directors are designees of X and, for a number of years, X has actively participated in and exercised a controlling influence over the affairs of C. Under § 304(b)(4), OFDI could deem C to be an AFN notwithstanding X's present 9 percent interest. As a matter of policy, however, such discretion would not normally be exercised unless X transfers more than $200,000 in funds or other property to C during any year commencing with the year 1968.

Example 6. (*Second-tier AFNs.*) A U.S. corporation (X) owns 10 percent of the outstanding voting stock of a French corporation (C). C owns a factory in Argentina, a sales office in Brazil, a sales office in Japan, a sales office in the United Kingdom and numerous factories and sales offices in continental Europe. The Japanese sales office has gross assets of less than $50,000 and, therefore, cannot be an AFN because of the exemption in § 304(d)(i). Accordingly, C is an incorporated AFN located in Schedule C, embracing also the factories and sales offices in continental Europe and in Japan. Assuming the inapplicability of the exemptions set forth in § 304(d), the factory in Argentina, the sales office in Brazil, and the sales office in the United Kingdom are separate unincorporated AFNs of X (§ 304 (a)(1)(iii) and (b)(1)).

Example 7. (*Bank or brokerage account.*) An individual within the United States maintains a number of bank accounts with foreign banks and also maintains an account with a German stock brokerage firm. Neither the bank accounts nor the brokerage account are AFNs.

Example 8. (*Investment real estate.*) An individual within the United States purchased a parcel of 1,000 acres of undeveloped real estate in Brazil for $75,000 in 1967. The land is being held for investment. The real estate is an unincorporated AFN (see § 304 (a)(1) (ii) and (b)(1).

Example 9. (*Commission salesmen.*) A U.S. corporation (X) enters into a contract with an individual citizen of Argentina (A) pursuant to which A will be X's exclusive representative in Latin America to solicit orders for X's products. A is not to handle the products of any other company but is to work full time in soliciting orders for X. A has no authority to accept orders, but must forward them to X for approval. A is to be compensated on a commission basis based on the gross sales of X's products attributable to A's efforts. All payments for such sales must be remitted directly to X by the purchaser. X is to pay the rental for A's office in Buenos Aires, but all of A's other expenses (including the salaries of clerical and other required personnel) are to be paid by A out of his commissions. The Buenos Aires telephone directly is to carry a listing in X's name showing the telephone number of A's office. X also rents space in a warehouse in Buenos Aires, from which orders from Latin American customers are filled. Under the foregoing facts A's operation is not an AFN.

Example 10. (*Sales agents.*) A U.S. corporation (X) employs five salesmen who travel throughout Europe to solicit orders for X's products. The salesmen operate out of a rented office in France and are all permanent residents of France. All orders must be accepted by X in the United States, but payment is made to the office in France. The rental and all other expenses of the sales office, including the salaries of the salesmen and other office personnel, are paid by X. Assuming the inapplicability of § 304(d), the sales office operation is an unincorporated AFN of X because it is a business venture conducted on behalf of X by employees of X (see § 304 (a)(1)(ii) and (b)(1)).

Example 11. (*Sales agents; leased warehouse facilities.*) A U.S. corporation (X) sells

its products in continental Europe through independent sales agents in Europe, who also sell products of many other U.S. corporations. The agents are compensated strictly on a commission based on their gross sales of X's products. X also employs salaried salesmen in the United States who periodically travel to Europe to make sales to X's largest European customers. X does not maintain any permanent manufacturing or sales facility in Europe. Under the foregoing facts X does not have AFNs in Schedule C. In addition, if in order to expedite deliveries to its European customers, X rents space in a warehouse in the Netherlands where a substantial inventory is maintained and orders from X's European customers are filled from this inventory, periodically being replenished by X, such operation would not constitute an AFN. Note that the result would be different if X owned the warehouse (assuming the inapplicability of § 304(d)); in that case, the warehouse itself would be an AFN.

Example 12. (*U.S.-based consulting services.*) A U.S. corporation (X) is engaged in rendering management consulting services. Many of its clients are unaffiliated foreign corporations. During the course of a year, X's salaried personnel, all of whom are permanent residents of the United States, travel to X's foreign customers to render consulting services. They typically work at the head offices of the foreign companies for 1 to 2 months at a time. X does not have any AFNs by virtue of the foregoing facts.

Example 13. (*Construction projects.*) A U.S. corporation (X) is engaged in the construction business. During the course of a year, X bids on numerous European construction projects and receives contracts on a small fraction thereof. X has a permanent office in France where a variety of personnel are employed, principally to gather information concerning contemplated construction projects and to supervise and coordinate all projects on which X is then working. In January 1968, X received two contracts for construction of factories in Germany and Belgium. Soon thereafter, X transferred men and equipment to the project sites. Assuming the inapplicability of § 304(d), each project site is an unincorporated AFN of X, as is X's office in France (see § 304 (a) (1) (iii) and (b) (1)). (Note that the office in France is an AFN without regard to the opening of the German and Belgian project sites.)

Example 14. (*Oil concessions and licenses for exploration.*) A U.S. corporation (X) obtains a concession from a Schedule B country to drill for oil within that country. X then enters into a joint venture agreement with two U.S. and two foreign companies for the purpose of exploiting the concession. Under the terms of the agreement, X is entitled to receive 25 percent of any ensuing production. The oil exploration venture is an unincorporated AFN of X located in Schedule B (see § 304 (a) (1) (ii) and (b) (1)). Note that the joint venture will also be an unincorporated AFN of the other U.S. corporations, and that X and the other U.S. corporations are members of an "associated group". (See § 905.)

Example 15. (*Retail franchises.*) A U.S. corporation (X) operates, under a single trade name, a chain of quick-service restaurants throughout the United States. X franchises an unaffilated French corporation (C) to open a restaurant in France using X's trade name. C agrees to purchase some of its goods from X, maintain certain quality standards, and pay X a yearly royalty based on profits. X does not have an AFN in France by virtue of this franchise arrangement.

Example 16. (*Break-even or loss ventures.*) Four U.S. news-publishing corporations (V, W, X, and Y) establish a membership corporation under New York law (Z). V, W, X, and Y each contributes 25 percent of the capital required by Z and each has 25 percent of the voting power in Z. Z is to gather news for the respective publications of V, W, X, and Y. In this connection, Z will establish and staff various permanent newsgathering offices throughout the world. Z is designed to operate on a break-even basis. The offices established by Z are unincorporated AFNs of V, W, X, Y, and Z even though not themselves operated for profit, since they are directly related to business activities that are for profit.

B305—Direct Investor

Section 305 defines the term "direct investor" ("DI") generally to mean any person within the United States (defined in § 322) owning or acquiring (directly or indirectly) a 10 percent or greater interest in a corporation or partnership organized under the laws of a foreign country or in a business venture conducted within a foreign country (an "affiliated foreign national," defined in § 304).

A DI may be a multiple entity or several individuals treated as a single person under § 323 (international finance subsidiaries of a direct investor). § 903 (affiliated groups), or § 904 (family groups). The term also includes a person owning less than a 10 percent interest in a particular foreign corporation, partnership or business venture, if (a) such person is a member of an associated group, as defined in § 905, that acts in concert pursuant to an agreement or understanding to own or to acquire a 10 percent interest in the foreign enterprise, or (b) such person owns a direct interest in another DI and an election, consented to by such person, is made with respect to such other DI under § 906 (b) (1).

A person within the United States first acquiring the requisite interest in a foreign corporation, partnership, or business venture will be treated as having been a DI in the foreign enterprise immediately preceding the acquisition. Accordingly, initial acquisition of the requisite interest will involve a § 312(a) (1) transfer of capital (see also § 313(d) (2)). Thus, for example, if a U.S. corporation (X), owning no interest in a French corporation (C), acquires 10 percent or more of the outstanding voting stock of C from an unaffiliated foreign national for $1 million in cash, X will be treated as a DI in C immediately prior to the closing of such acquisition and will, therefore, be treated as having made a $1 million transfer of capital to C.

Although acquisition or ownership of a 10 percent voting interest in a foreign corporation, or a 10 percent profits interest in a foreign partnership or business venture, is ordinarily required to constitute the foreign enterprise an AFN of a person within the United States, the regulations provide that a foreign enterprise in which a lesser interest is held may nevertheless be deemed an AFN (§ 304(b) (4)). For example, such discretionary authority might be exercised if a U.S. person were to acquire a contingent 10 percent interest in the voting securities of a foreign corporation, or a 10 percent present interest in the capital or earnings of a foreign corporation without voting rights. As a general rule, however, such determination would not be made by OFDI unless the U.S. person actually participates in and exercises a controlling influence over the affairs of the foreign enterprise and transfers funds or other property to the foreign enterprise exceeding $200,000 during any year commencing with 1968.

B306—Direct Investment

§ B306–1 Introduction.

Section 306(a) defines the term "direct investment" for purposes of the regulations. Direct investment, which may be positive or negative, means the sum of a DI's net transfer of capital to incorporated and unincorporated AFNs (defined in § 313(c)) and the DI's share of reinvested earnings of incorporated AFNs (defined in § 306(b)) during any period, usually a calendar year (see § 321). A DI governed by the § 503 minimum allowable will calculate direct investment on a worldwide basis. A DI governed by the § 504(a) historical allowable or the § 504(b) earnings allowable will calculate direct investment on a schedular basis.

A DI governed by the § 507 alternative minimum and Shedule A supplemental allowable will calculate direct investment on a combined basis for Schedules B and C and separately for Schedule A.

Under § 313(d) (1), proceeds of long-term foreign borrowing (defined in § 324 (c)) actually expended by a DI in making transfers of capital to AFNs are deducted in calculating the net transfer of capital component of direct investment. Section 306(e) (1) permits deduction of "available proceeds" of such borrowing (defined in § 324(d)) that are "allocated" on the DI's books and records as an offset to positive direct investment.

§ B306–2 Summary.

In addition to defining the term "direct investment," § 306 deals with calculation of "reinvested earnings" and sets forth a number of rules to be followed in calculating the DI's share of such earnings as a component of direct investment.

The major topics covered in §306 are: Basic definition of direct investment (§ 306(a)); definition of reinvested earnings (§ 306(b)); calculation of AFN earnings or losses (§ 306(c)); branch AFN earnings deemed remitted (§ 306(d) (1)); definitions and rules for dividends (§ 306(d) (2)), and allocation of proceeds of long-term foreign borrowing (§ 306 (e)).

§ B306–3 Relation of § 306 to other sections.

Direct investment as defined in § 306 consists of a number of components. The way in which these various components enter into the calculation of direct investment is illustrated by the following diagram:

COMPUTATION OF DIRECT INVESTMENT

NET TRANSFER OF CAPITAL (§ 313)		REINVESTED EARNINGS (§ 306(b))		
Components		*Components*		
+Transfers of capital: DI to AFNs (§ 312(a)). −Transfers of capital: AFNs to DI (§ 312(b)). −Expended proceeds of long-term foreign borrowing (§ 313(d)(1)). ±Transfers of capital: AFNs to AFNs (§ 505). ±Net transfer of capital: DI to unincorporated AFN, i.e., net increase or decrease in assets (§ 313(b)).	*Plus*	DI's share of: +Total earnings (§ 306(c)). −Dividends to DI (§ 306(b)(2)(x)). −Dividends paid by AFNs to AFNs in other areas (§ 306(b)(2)(y)). +Dividends received by AFNs from AFNs in other areas (§ 306(b)(1)(i)). +Profits remitted from unincorporated AFNs in other areas (§ 306(b)(1)(ii)).	*less*	ALLOCATED PROCEEDS OF LONG-TERM FOREIGN BORROWING (§§ 306(e), 203(d)(2) and (3).)

§ B306–4 Application of § 306.

The § 306(a) definition of direct investment applies to calculations in all scheduled areas during 1965–66 as well as for subsequent years.

The rules for calculating direct investment are modified in § 504(e). A DI governed by one of the § 504 allowables is required to disregard total losses of Schedule C incorporated AFNs in calculating direct investment in that scheduled area. Note that in 1969, if the AFNs of a DI governed by the § 503 minimum allowable had an aggregate annual loss, the DI was required to disregard such aggregate annual loss in calculating direct investment. See former § 503(b), which has been revoked for 1970 and succeeding years.

§ B306–5 Basic definition and calculation of direct investment.

Section 306(a) defines direct investment during any period as the sum of (a) net transfer of capital (defined in § 313(c)) and (b) the DI's share in the reinvested earnings of all incorporated AFNs (defined in § 306(b)). If the sum of DI's net transfer of capital and DI's share of reinvested earnings is greater than zero, DI has made "positive direct investment"; if the sum is less than zero, DI has made "negative direct investment."

Direct investment is an aggregate concept. It does not refer to individual transactions, but to the net effect of all transactions during a reporting period.

Direct investment is also a schedular concept. It does not apply to individual AFNs or countries, but to all AFNs of a DI located in each scheduled area. Since § 503 provides a worldwide allowable, however, a DI governed by this section will report direct investment on a consolidated, worldwide basis, and a DI governed by § 507 will report direct investment in Schedules B and C on a consolidated basis.

Direct investment in Canada is excluded from the computation of direct investment under § 306(a). (See §§ 1103–1104.)

The following examples illustrate calculation of direct investment under § 306(a):

Example 1. DI has several wholly owned incorporated AFNs in Schedule A. (The number of individual AFNs is not important.) DI has no other AFNs. During 1969 the AFNs together earn $800,000 and pay dividends of $200,000 to DI. DI's share in reinvested earnings, therefore, is $600,000. DI also makes a § 313(a) net transfer of capital to the AFNs of $500,000. DI has made positive direct investment in Schedule A for 1969 of $1,100,000.

In 1970 the same AFNs earn $600,000 and pay no dividends. During that year, however, the AFNs jointly loaned DI $700,000, resulting in a negative net transfer of capital in that amount, by operation of §§ 312(b)(1) and 313(a). Accordingly, DI has made negative direct investment of $100,000.

Example 2. DI's only AFNs are two wholly owned incorporated AFNs in Schedule B: X and Y. During 1969 X earns $400,000, and Y has losses of $200,000. No dividends are paid, and DI makes no net transfer of capital.

DI's share of reinvested earnings is $200,000. Positive direct investment for 1969 is also $200,000, since the net transfer of capital was zero.

During 1970, X has earnings of $100,000, and Y has losses of $300,000. X pays DI a dividend of $50,000. Reinvested earnings are negative in the amount of $250,000 (total losses and dividends). DI's net transfer of capital to Schedule B under § 313(a) is $600,000. Positive direct investment for 1970 is, therefore, $350,000 ($600,000 positive net transfer of capital less the $250,000 negative reinvested earnings).

If X and Y had been located in Schedule C and DI had elected a § 504 allowable, § 504(e) would have required the total losses of $200,000 to be omitted from calculation of direct investment. Direct investment would then have been $550,000.

Example 3. DI has a group of wholly owned incorporated AFNs in Schedule C that have subsidiaries (also AFNs of the DI) in Schedules A and B. In 1969 the Schedule C AFNs have earnings of zero and pay no dividends. DI makes no transfers of capital. However, the Schedule C AFNs receive dividends of $300,000 from their subsidiaries in Schedules A and B. As a result, DI has made positive direct investment of $300,000 in Schedule C consisting entirely of reinvested earnings. (Reinvested earnings in a given scheduled area are increased by dividends received by AFNs from AFNs in other scheduled areas, and reinvested earnings are reduced in the scheduled area from which the dividends are paid (see § 306(b).)

§ B306–6 Reinvested earnings of incorporated AFNs.

To compute a DI's share in the reinvested earnings of all incorporated AFNs in a scheduled area during any year, it is first necessary to determine the DI's share of the total earnings (or total losses) of such AFNs during the year, as defined in § 306(c). Total earnings or losses consist of the aggregate earnings or losses of each of the incorporated AFNs in a particular scheduled area. Reinvested earnings are then found by adjusting total earnings to take into account dividends to the DI and interschedular dividends and profit remittances.

(i) *Total earnings.* Earnings or losses of each incorporated AFN should be computed in accordance with accounting principles (including principles of consolidation) generally accepted in the United States and consistently applied by the DI in financial reports for presentation to stockholders. Any material change in accounting procedures followed by a DI should be disclosed on the reporting form filed with OFDI for the period in which the change was made, together with an indication of the effects of such change.

In calculating total earnings of incorporated AFNs, the following considerations merit particular attention:

Dividends: Dividends received by an incorporated AFN from another incorporated AFN, whether in the same or another scheduled area, should not be included in calculating earnings of the recipient AFN. (See § 306(c).)

Profit interest in unincorporated AFN of the DI: If an incorporated AFN has an interest in a partnership or business venture in another scheduled area that is a separate unincorporated AFN under § 304, the incorporated AFN's share in any profits of the unincorporated AFN should not be included in calculating earnings of the incorporated AFN, whether or not any such profits are actually remitted. (See § 306 (c) and (d)(1).)

Interests in United States: If an incorporated AFN has an interest in a U.S. corporation, partnership or business venture that would be a separate AFN of the DI if such U.S. enterprise were a foreign national, neither dividends received from such corporation nor the share in profits of such partnership or business venture (whether or not any such profits are actually remitted) should be included in calculating earnings of the incorporated AFN.

Foreign taxes: Earnings of incorporated AFNs should be computed net of foreign taxes on income or net worth. Foreign withholding taxes on dividends paid or branch profits distributed should not, however, be deducted except for withholding taxes on dividends received by an incorporated AFN from AFNs in the same scheduled area. (See § 306(c).)

Charge for intangibles: No deduction for amortization or any like charge against earnings should be made with respect to an intangible owned by an AFN, if transfer of the intangible by the DI to the AFN was made on or after January 1, 1968, and was not considered a transfer of capital by virtue of § 312(c)(11).

Blocked earnings: Earnings that are "blocked" because of exchange controls or other like restrictions imposed by the government of a foreign country should nevertheless be included in earnings. Under certain conditions, OFDI may grant appropriate relief (pursuant to § 801) in these circumstances. (See Appendix hereto.)

Reserve requirements: No deductions from earnings should be made because of reserves for reinvestment, asset revaluation or legal reserve requirements, whether or not locally required, if they would not be proper charges to income under generally accepted U.S. accounting principles consistently applied.

Valuation: The assets, liabilities, and earnings of an AFN expressed in foreign currency should be converted into U.S. dollar equivalents in accordance with generally accepted U.S. accounting principles consistently applied. Such accounting treatment should also be followed with respect to gain or loss resulting from currency devaluation or revaluation.

Extraordinary gains and losses: Extraordinary gains and losses of an incorporated AFN (including gains or losses resulting from sales

by the AFN of interests in other AFNs), casualty insurance proceeds to the extent that they exceed the value of the assets lost or damaged and proceeds of business interruption insurance should generally be included in earnings. However, gains or losses realized by a DI resulting from sale of an interest in an AFN are not included in reinvested earnings under § 306(b) in any scheduled area; rather, they constitute a transfer of capital to the DI under § 312(b)(5).

The following example illustrates calculation of total earnings of incorporated AFNs in a given scheduled area, pursuant to § 306(c):

Example 4. DI has three wholly owned subsidiaries in Schedule C. One subsidiary (D) has a branch (W) in Schedule A and a branch (X) in Schedule C; W is a separate AFN of the DI, but X is not. (See § 304(a)(1)(iii).) Another subsidiary (E) has a wholly owned subsidiary (Y) in Schedule B and another wholly owned subsidiary (Z) in Schedule C. The third subsidiary (F) has no branches or subsidiaries.

The following occurs during 1969: D earns $1,700,000, $200,000 of which is attributable to earnings of W and $500,000 to earnings of X. Y earns $500,000 and pays a dividend of $300,000 to E. Z earns $200,000, a portion of which is attributable to sale of merchandise to D, and pays a dividend of $100,000 to E. E earns $2,400,000, including the dividends from Y and Z. F incurs a loss of $400,000.

Under § 306(c), total earnings of DI's incorporated Schedule C AFNs (D, E, and F) are $3,300,000, computed as follows (000 omitted):

Earnings of D under § 306(c) (W's earnings of $200 are excluded, since W is in another scheduled area. X's earnings of $500 are not excluded, because X is not a separate AFN)	$1,500
Earnings of E under § 306(c) (Dividends of $300 from Y and $100 From Z are excluded)	2,000
Earnings of Z under § 306(c) (Portion attributable to sales to D included)	200
Loss of F	(400)
Total earnings	3,300

(ii) *DI's share of total earnings.* A DI's share in the total earnings (or losses) of incorporated AFNs in a given scheduled area is the sum of the DI's percentage interest in total earnings (or losses) of each such AFN in that scheduled area.

Example 5. DI has three incorporated AFNs in Schedule C (companies D, E, and F). DI owns 50 percent of the stock of D, 60 percent of the stock of E and 80 percent of the stock of F. D has a branch (W) in Schedule A and a branch (X) in Schedule C; W is a separate AFN of DI, but X is not. (See § 304(a)(1)(iii).) E has a wholly owned subsidiary (Y) in Schedule B and another wholly owned subsidiary (Z) in Schedule C.

The following occurs during 1969: D earns $1,700,000, $200,000 of which is attributable to earnings of W and $500,000 to earnings of X. Y earns $500,000 and pays a dividend of $300,000 to E. Z earns $200,000, a portion of which is attributable to sale of merchandise to D, and pays a dividend of $100,000 to E. E earns $2,400,000 including the dividends from Y and Z. F incurs a loss of $400,000.

DI's share in the total earnings of incorporated Schedule C AFNs is $1,750,000 computed as follows, pursuant to § 306(c) (see table in Example 4 for treatment of earnings of the AFNs' branches or subsidiaries):

AFN earnings (000 omitted)	*DI's share* (000 omitted)
Earnings of D ($1,500×50%)	$750
Earnings of E ($2,000×60%)	1,200
Earnings of Z ($200×60%)	120
Loss of F ($400×80%)	(320)
DI's share of total earnings	1,750

It should be stressed that in Examples 4 and 5 above, only earnings of DI's Schedule C incorporated AFNs were the subject of consideration. Y's earnings would be included in the calculation of reinvested earnings for DI's Schedule B incorporated AFNs under § 306(b), and the profits of W would be included in DI's net transfer of capital to unincorporated AFNs in Schedule A under § 313(b).

Total earnings should always be carefully distinguished from reinvested earnings and from earnings of unincorporated AFNs.

(iii) *Reinvested earnings.* After computing total earnings of incorporated AFNs and DI's share thereof, the next step in calculating direct investment is to find the DI's share of reinvested earnings. The method of determining reinvested earnings of incorporated AFNs in any scheduled area during a year is set forth in § 306(b). The DI's share of reinvested earnings in a scheduled area will generally equal the DI's share of total earnings of such AFNs for the year, less all dividends paid during the year by the AFNs to the DI and to AFNs in other scheduled areas, plus dividends received from incorporated AFNs in other scheduled areas and profits remitted from unincorporated AFNs in other scheduled areas.

Under § 306(d)(1), profits of an unincorporated AFN during the year are deemed to have been remitted to the extent that profits exceed the net increase in the net assets of such AFN during the year; if there has been no change, or a decrease, in such net assets during the year, all profits for such year are deemed to have been remitted. Dividends paid by incorporated AFNs to the DI or other AFNs are reported before deduction of foreign dividend withholding taxes; dividends and other profit distributions received by AFNs from AFNs in other scheduled areas are reported after deduction of foreign dividend withholding taxes.

For purposes of the regulations, dividends include all cash dividends, whether paid out of current or accumulated earnings. Stock dividends or dividends in kind do not qualify as dividends under the regulations. (See § 306(d)(2).) Distributions in complete or partial liquidation will qualify as dividends, but only to the extent the corporation being liquidated has current or accumulated earnings properly allocable to the distributions. Payments to a DI of amounts previously taxed under the provisions of §§ 551 through 558 and 951 through 981 of the Internal Revenue Code (1954) will qualify as dividends.

Dividends paid by one AFN to another AFN in the same scheduled area do not enter into any of the calculations required by § 306. They are not included in determining earnings of the recipient AFN, they are not deducted in calculating total dividends paid by the recipient AFN, and they are not included as dividends in calculating total dividends paid by the paying AFN. However, any foreign withholding taxes imposed on the payment of such dividends should be deducted in calculating total earnings of incorporated AFNs in the scheduled area involved. For example, DI has a wholly owned subsidiary (X) in Schedule C, that in turn has a wholly owned subsidiary (Y) in Schedule C. X and Y each earn $100,000, Y pays a $50,000 dividend to X on which there is imposed a $15,000 foreign withholding tax, and X pays a $50,000 dividend to DI on which there is also imposed a foreign withholding tax of $10,000. Total earnings of DI's Schedule C incorporated AFNs are $185,000 (i.e., $200,000 minus the $15,000 tax on dividend from Y to X) and DI's share in reinvested earnings of all such AFNs is $135,000 (i.e., $185,000 minus the $50,000 dividend (excluding the $10,000 tax) paid by X to DI).

A dividend will generally be considered as having been paid or received when it first becomes payable on demand. This will ordinarily coincide with the dividend payment date, but in some cases it may coincide with the declaration date. Note that a dividend declared but not paid by an AFN when due is treated as having been paid (thus reducing the DI's share in reinvested earnings of the AFN) and then loaned back to the AFN (resulting in a transfer of capital by the DI to the AFN); subsequent payment of the amount due by the AFN will then be treated as a transfer of capital by the AFN to the DI. The same attribution of transfers of capital is applicable to dividends declared by an AFN that are not paid when due to AFNs in another scheduled area.

It should be noted that a DI may elect, on its original Base Period Report (Form FDI-101), to treat dividends received from AFNs within 60 days after the end of any compliance year as having been paid during such year; such election, if made, must also be reflected in the calculation of direct investment during the base period years, and cannot be changed without the permission of OFDI.

The following formula may be helpful in applying the § 306(b) definition of reinvested earnings:

$$RE = TE - [(DP + dp) - (dr + pr)]$$

RE=DI's share of reinvested earnings of all incorporated AFNs in a scheduled area.

TE=DI's share of total earnings of all incorporated AFNs in the scheduled area.

DP=Dividends declared by AFNs in the scheduled area that are paid or payable to DI.

dp=DI's share of dividends declared by AFNs in the scheduled area that are paid or payable to AFNs in other areas.

dr=DI's share of dividends that are paid or payable to AFNs in the scheduled area by AFNs in other areas.

pr=DI's share of profits remitted to AFNs in the scheduled area from unincorporated AFNs in other areas.

Example 6. DI has two wholly owned and two 60-percent-owned subsidiaries in Schedule C. One wholly owned subsidiary (D) has a branch (V) in Schedule A. The second wholly owned subsidiary (E) has a 50-percent-owned subsidiary (W) in Schedule A. One 60-percent-owned subsidiary (F) has a branch (X) in Schedule A. The branches V and X in Schedule A are separate AFNs. See § 304(a)(1)(iii). The other 60-percent-owned subsidiary (G) has a wholly owned subsidiary (Z) in Schedule A. DI also has a wholly owned subsidiary (H) in Schedule A.

In 1969 D earns $800,000 and pays a dividend of $500,000 to DI. Of D's earnings, $300,000 is attributable to profits of V, which had an increase in net assets of $100,000. E earns $500,000 and pays no dividends to DI. Of E's earnings, $200,000 is attributable to a dividend received from W, which itself earns $600,000. F earns $1 million and pays a dividend of $200,000 to DI. Of F's earnings, $200,000 is attributable to profits of X, which had no change in its net assets. G earns $2 million and pays a dividend of $500,000 to DI. Of G's earnings, $400,000 is attributable to a dividend received from Z, which itself earns $900,000. H earns $1,500,000 and pays a dividend of $1 million to DI. Reinvested earnings of DI's incorporated AFNs are computed as follows:

Schedule C reinvested earnings [RE]:

DI's share in the total reinvested earnings of its incorporated Schedule C AFNs (D, E, F, and G) is $1,800,000 computed as follows (000 omitted):

Total earnings [TE]:	
DI's share of earnings of D: $800 less profits of V ($300)	$500
DI's share of earnings of E: $500 less dividend received from W ($200)	300
DI's share of earnings of F: $600 less profits of X ($200×60%)	480
DI's share of earnings of G: $1,200 less dividend received from Z ($400×60%)	960
DI's share of total earnings	2,240
Dividends paid to DI [DP]:	
By D	$500
By E	0
By F	200
By G	500
Total	1,200
Dividends paid to AFNs in other areas [dp]	$0
Dividends received and profits remitted [dr+pr]:	
DI's share of profits deemed remitted by V to D under § 306(d)(1): Earnings ($300) less net increase in assets ($100)	200
DI's share of dividends received by E from W	200
DI's share of profits deemed remitted by X to F under § 306(d)(1) ($200×60%)	120
DI's share of dividend received by G from Z ($400×60%)	240
DI's share of all dividends received and profits remitted	760

Applying the formula RE=TE−[(DP+dp)−(dr+pr)]:

RE=$2,240−[$1,200−$760]=$1,800

Schedule A reinvested earnings [RE]:

DI's share in the total reinvested earnings of its incorporated Schedule A AFNs (H, W, and Z) is $900,000 computed as follows (000 omitted):

Total earnings [TE]:	
DI's share of earnings of H	$1,500
DI's share of earnings of W ($600×50 percent)	300
DI's share of earnings of Z ($900×60 percent)	540
DI's share of total earnings	2,340
Dividends paid to DI and DI's share of dividends paid to AFNs in other areas [DP+dp]:	
Dividends paid by H to DI	$1,000
DI's share of dividend paid by W to E	200
DI's share of dividend paid by Z to G ($400×60 percent)	240
Total	1,440
Dividends received and profits remitted [dr+pr]	0

Applying the formula RE=TE−[(DP+dp)−(dr+pr)]:

RE=$2,340−[$1,440−0]=$900

Example 7. Assume the same facts as in Example 6 above, except that H incurs a loss of $1 million and pays no dividend. DI's share in the total reinvested earnings of Schedule A AFNs is a negative $600,000, computed as follows (000 omitted):

Total earnings [TE]:	
DI's share of loss of H	($1,000)
DI's share of earnings of W	300
DI's share of earnings of Z	540
DI's share of total earnings	(160)
DI's share of dividends paid [dp]:	
W to E	$200
Z to G	240
Total	440

RE=TE−[(DP+dp)−(dr+pr)]
RE=−$160−[(0+$440)−0]=−$600

§ B306–7 Deduction from positive direct investment: Allocated proceeds of long-term foreign borrowing.

Under § 306(e), the amount of positive direct investment charged to a DI may be reduced by allocating available proceeds of long-term foreign borrowing (see § 324(d)). Positive direct investment may also be reduced by allocating proceeds of long-term foreign borrowing that were previously expended in making a transfer of capital to another scheduled area (see § 203(d)(2)), and by reallocating proceeds previously allocated to a transfer of capital or positive direct investment in another scheduled area (see § 203(d)(3)).

An allocation of available proceeds to reduce positive direct investment is subject to certain conditions:

The allocation must be reflected on the books and records required to be maintained by the DI under §§ 203(b) and 601.

The allocation and reduction of positive direct investment must be reported on the DI's Form FDI–102F covering the year in which the reduction is made.

At the end of a year in which an allocation is made, proceeds that were allocated may not be held, directly or indirectly, in the form of foreign balances (see § 203(a)(1)), securities of foreign nationals, or any other foreign property.

In succeeding years, allocated proceeds may not be held in the form of foreign property, except that such proceeds may be expended in making transfers of capital to AFNs. Such an expenditure will not be eligible for the deduction from net transfer of capital provided under § 313(d)(1).

The concept of allocation is illustrated in the following example:

Example 8. In 1969 DI makes a net transfer of capital to its AFNs in Schedule A in the amount of $800,000, and its share of reinvested earnings of incorporated AFNs in Schedule A is $500,000. DI has made positive direct investment under § 306(a) of $1,300,000. If DI has available proceeds in the amount of $1,300,000 at the end of 1969, and the proceeds are not then held in the form of foreign property, DI may allocate such proceeds to its positive direct investment in Schedule A and reduce the amount of such investment to zero. The allocation and reduction must be reflected on DI's books and records and on Form FDI–102F for the year 1969.

In addition to § 306(e), three other provisions of the regulations relate to deductions for use of proceeds of long-term foreign borrowing. Section 313(d)(1) provides for mandatory deduction from net transfer of capital of the amount of proceeds (defined in § 324(c)) actually expended in making transfers of capital. Section 203(d) (2) and (3) are analogous to § 306(e) insofar as they allow deductions from positive direct investment for allocation of proceeds. Section 203(d)(2) allows a DI to allocate previously expended proceeds (or proceeds allocated during 1968) to a new scheduled area, thus obtaining a deduction from positive direct investment in the new area (with a corresponding § 312(a) transfer of capital to the prior area). Section 203(d) (3) allows a DI to reallocate to a new scheduled area proceeds previously allocated under § 306(e) (with a corresponding § 312(a) transfer of capital to the prior area).

For a more detailed analysis of long-term foreign borrowing, see § B324.

Section 306(e)(3) provides for the schedular apportionment of deductions for allocations of borrowings to positive direct investment calculated on a worldwide basis under § 503 or calculated on a combined schedular basis under § 507 as to Schedules B and C. Section 306(e)(3) is applicable only if the DI elects a schedular allowable and in the same year incurs a repayment charge or makes a reallocation with respect to a borrowing previously allocated to worldwide or combined schedular investment under § 503 or § 507. For example, if the DI takes a § 306(e) deduction from worldwide positive direct investment under § 503 and then repays the borrowing in a year in which § 504 or § 507 is elected, the repayment charge to each scheduled area for purposes of § 312(a)(7) is established by § 306(e)(3). Similar treatment is provided for borrowings allocated to combined Schedules B/C under § 507 that are subsequently repaid in a year of electing § 504. Schedular apportionment of an aggregate deduction must also be made under § 306(e)(3) if the DI intends subsequently to reallocate between scheduled areas.

The rule of § 306(e)(3) does not apply to a deduction under § 313(d)(1), which

is recognized in the scheduled area where the transfer of capital was made with available proceeds.

(i) *Recalculation of worldwide positive direct investment under § 503 and combined Schedules B/C positive direct investment under § 507.* Section 306(e)(3) deems a § 306(e) deduction to have been made in proportion to the amount of positive direct investment in each scheduled area (negative direct investment being treated as zero for this purpose). DI should, therefore, recalculate direct investment for each schedule, taking into account all interschedular transfers (§ 505), dividends and profit remittances. Treatment of aggregate annual losses (former § 503(b)) in recalculating 1969 direct investment by scheduled area is discussed below in paragraph (iii) of this section.

Example 9. DI elected § 503 for 1969 and made positive direct investment worldwide of $2 million. To comply with the regulations, DI made a long-term foreign borrowing of $1 million and allocated the proceeds to positive direct investment, under § 306(e)(1).

Assume that DI recalculates 1969 direct investment by scheduled area as follows ($000 omitted):

	Scheduled area		
	A	B	C
Direct investment	1,000	(500)	1,500
Proportionate amount	40%	0%	60%

DI's deduction under § 306(e)(1) is deemed by § 306(e)(3) to have been made as follows: Schedule A—$400,000 ($1,000,000×40%); Schedule B—0; and Schedule C—$600,000 ($1,000,000×60%).

Complete or partial repayment of the borrowing will be charged under § 312(a)(7) to each scheduled area in the same proportions (Schedule A—40%; Schedule B—0%; and Schedule C—60%). The DI may also reallocate to other scheduled areas on the basis of the amounts apportioned to each area under § 306(e)(3).

Example 10. Same facts as in Example 9. For 1970 DI elects § 507 and makes positive direct investment of $1,200,000 in Schedules B/C, consisting of $480,000 (40%) in Schedule B and $720,000 (60%) in Schedule C. DI reallocates under § 203(d)(3) to Schedules B/C $200,000 of the $400,000 deemed allocated to Schedule A in 1969. The reallocation to combined positive direct investment in Schedules B/C under § 203(d)(3) is deemed by § 306(e)(3) to have been made as follows: Schedule B (40%)—$80,000; and Schedule C (60%)—$120,000.

In 1971 DI elects § 504 and repays the borrowing in full. For purposes of § 312(a)(7), deductions in each area are as follows: Schedule A—$200,000 ($400,000 deemed allocated in 1969 less $200,000 reallocated in 1970); Schedule B—$80,000 ($80,000 deemed allocated in 1970); and Schedule C—$720,000 ($600,000 deemed allocated in 1969 plus $120,000 deemed allocated in 1970). Transfers of capital under § 312(a)(7) on account of the repayment will be charged to each area in the same amounts.

(ii) *Relation to § 313(d)(1) deductions.* If the DI also expended proceeds of the borrowing in making a transfer of capital, the § 313(d)(1) deduction will be recognized in the scheduled area where the transfer of capital was made, in addition to deductions deemed made in such area by § 306(e)(3), as illustrated by the following example:

Example 11. DI elected § 503 in 1969. During 1969, DI borrowed $1,500,000 and expended $500,000 in making transfers of capital to Schedule A, taking a deduction therefor under § 313(d)(1). DI also transferred $500,000 each to Schedules A and B and $1 million to Schedule C. To comply with the regulations, DI allocated the $1 million of remaining available proceeds to worldwide positive direct investment, taking a deduction under § 306(e)(1). DI's total deductions for purposes of § 312(a)(7) are: Schedule A—$750,000; Schedule B—$250,000; and Schedule C—$500,000, computed as follows ($000 omitted):

	Scheduled area		
	A	B	C
(a) Net transfer of capital	1,000	500	1,000
(b) Less § 313(d)(1) deduction	500	0	0
(c) Positive direct investment under § 306(a)	500	500	1,000
(d) § 306(e)(1) deduction		(1)	
(e) § 306(e)(1) deduction apportioned under § 306(e)(3) on basis of line (c)	250	250	500
(f) Total deductions (Lines (b) and (e))	750	250	500

[1] 1,000 worldwide.

Complete or partial repayment of the borrowing in a subsequent year will be charged as follows if § 504 is elected: Schedule A—50 percent; Schedule B—16⅔ percent; and Schedule C—33⅓ percent. If § 507 is elected, the apportionment of the transfer of capital would be: Schedule A—50 percent; Schedules B and C—50 percent.

Note, however, that if the $500,000 deduction taken under § 313(d)(1) had been on account of a separate borrowing, repayments of that borrowing would be charged in full to Schedule A; and repayments of the borrowing allocated under § 306(e) would be charged only on the basis of the § 306(e) deductions as shown on line (e) of the above table (i.e., Schedule A—25 percent; Schedule B—25 percent; and Schedule C—50 percent). An allocation under § 203(d)(2) would be made on the basis of the amount shown on line (b) of the table and reallocations under § 203(d)(2) or (3) on the basis of line (e).

(iii) *Treatment of aggregate annual losses in recalculating 1969 direct investment under § 503 by scheduled area.* Section 503(b) in effect for 1969 required DIs to disregard aggregate annual losses in calculating worldwide direct investment under the $1 million minimum allowable; i.e., the amount of such losses was to be added back to aggregate direct investment for all scheduled areas calculated in accordance with § 306. See § B503-3(ii). In recalculating 1969 positive direct investment for purposes of § 306(e)(3), the effect of the § 503(b) adjustment must be apportioned for each scheduled area. If a DI had aggregate annual losses for purposes of § 503(b) in 1969, direct investment should first be calculated for each scheduled area pursuant to § 306(a), taking all losses into account. Then the DI should add to direct investment in each scheduled area in which annual earnings (§ 504(b)(4)) were negative such scheduled area's share of aggregate annual losses, to be determined by multiplying aggregate annual losses by a fraction, the numerator of which is such area's negative annual earnings under § 504(b)(4) and the denominator of which is the sum of negative annual earnings for all areas where annual earnings were negative. See line (d) of the table in Example 13 below.

Example 12. DI elected § 503 for 1969. DI had only incorporated AFNs in Schedules A and B. DI transferred $500,000 to Schedule A, where its AFNs earned $500,000; and DI transferred $1 million to Schedule B, where its AFNs had losses of $1 million. No dividends were paid. DI had aggregate annual losses of $500,000 and positive direct investment worldwide under § 503 of $1,500,000, calculated as follows ($000 omitted):

	Scheduled area		
	A	B	Worldwide
Reinvested earnings	500	(1,000)	(500)
Net transfer of capital	500	1,000	1,500
Positive direct investment under § 306	1,000	0	1,000
Add back aggregate annual losses			500
Positive direct investment under § 503			1,500

For purposes of the schedular recomputation, aggregate annual losses are added to direct investment in the area where annual earnings were negative (Schedule B) in proportion to such area's share of all negative annual earnings (Schedule B—100%). Therefore, DI's § 306(e)(1) deduction will be apportioned on the basis of $1 million positive direct investment in Schedule A and $500,000 positive direct investment in Schedule B.

Example 13. DI elected § 503 in 1969. DI had only incorporated AFNs in Schedules A and B and unincorporated AFNs in Schedule C. DI made transfers of capital of $1 million to its AFNs in Schedule A and $3 million to its AFNs in Schedule B. DI's AFNs in Schedule A earned $500,000; the Schedule B AFNs lost $600,000, and the Schedule C AFNs lost $400,000 but had an increase in net assets of $100,000. DI's aggregate annual losses under § 503(b), therefore, were $500,000. There were no dividends or profit remittances. DI's worldwide positive direct investment was $4,500,000.

The following table illustrates the recalculation by scheduled area of 1969 direct investment ($000 omitted):

	Scheduled area		
	A	B	C
(a) Reinvested earnings	500	(600)	
(b) Net transfer of capital	1,000	3,000	100
(c) Direct investment under § 306(a)	1,500	2,400	100
(d) Adjustment for aggregate annual losses for purposes of § 306(e)(3)	0	[1] 300	[2] 200
(e) Direct investment for purposes of § 306(e)(3)	1,500	2,700	300

[1] $500 \times 600 \div 1{,}000 = 300$.
[2] $500 \times 400 \div 1{,}000 = 200$.

A deduction made under § 306(e), then, is deemed apportioned to the scheduled areas as follows: one-third to Schedule A; three-fifths to Schedule B; and one-fifteenth to Schedule C.

(iv) *Apportionment by other methods.* If a DI is unable to recompute direct investment by scheduled area, the Office may, upon application, permit deductions to be apportioned on some other reasonable basis.

§ B306–8 Calculation of direct investment during year of acquisition or disposition of interest in an AFN.

By operation of § 312(c)(1), acquisition by a DI of a debt or equity interest in an AFN from another DI does not give rise to a transfer of capital. However, if the acquisition is of an equity interest, the divesting DI's direct investment in the AFN during the year of acquisition and in 1965–66 will be imputed to the acquiring DI in proportion to the interest acquired, as will the divesting DI's share in earnings or losses of the AFN prior to acquisition.

If a DI disposes of an AFN (other than by a transaction covered by § 312(c)(1)), the sale does not affect any transfers of capital between the DI and the AFN preceding the date of disposition. Thus, for example, if DI makes a $1 million transfer of capital to an AFN in January and sells the AFN in October to a foreign national for $900,000, DI would be charged with a $100,000 net transfer of capital during the year with respect to such AFN.

If a DI sells an interest in an incorporated AFN to a foreign national, reinvested earnings attributable to the interest sold should not be included in computation of the DI's direct investment for the year of sale.

Example 14. DI has a wholly owned incorporated AFN in Schedule A. During 1969 DI sells a 40 percent interest in such AFN to a foreign national. The AFN earns $300,000 and pays no dividends. DI's share of reinvested earnings of the AFN is $180,000 ($300,000 × 60 percent), regardless of the date of divesture of the 40 percent interest.

If a DI acquires an interest in an incorporated AFN from a foreign national during a year, the DI must reflect a pro rata share of reinvested earnings in computing direct investment, based on the DI's share of total earnings multiplied by the fraction of the year during which the interest was held.

Example 15. DI reports on a calendar year basis. On April 1, 1969, DI acquires from a foreign national a 100 percent interest in an incorporated AFN that earns $200,000 for the entire year and pays a $50,000 dividend on March 1 and a $75,000 dividend on September 1. DI's share of total earnings is $150,000 ($200,000 × ¾). DI's share of reinvested earnings is $75,000 ($150,000 − $75,000). Note that the dividend paid prior to DI's acquisition is not reflected in the calculation of DI's reinvested earnings.

Example 16. During 1969, DI acquires from a foreign national the following interests in an AFN: 25 percent on January 1, an additional 30 percent on March 1 and an additional 20 percent on September 1. The AFN earns $1,200,000 during 1969 and pays no dividends. DI's share of reinvested earnings in the AFN for 1969 is $680,000:

$1,200,000 × (12/12) × 25% equals	$300,000
$1,200,000 × (10/12) × 30% equals	300,000
$1,200,000 × (4/12) × 20% equals	80,000
Total	680,000

B312—TRANSFERS OF CAPITAL

§ B312–1 Introduction.

Direct investment is defined in § 306(a) as the sum of a DI's net transfer of capital and the DI's share of reinvested earnings of incorporated AFNs. Computation of a DI's net transfer of capital (defined in § 313) is based upon the computation under § 312 of all transfers of capital from the DI to AFNs and all transfers of capital from AFNs to the DI. Section 312 sets forth rules and definitions for determining whether a given transaction constitutes a transfer of capital.

In general, a transfer of funds or other property that increases a DI's aggregate equity and debt investment in an AFN (or decreases an AFN's aggregate equity and debt investment in a DI) is a "positive" transfer of capital, i.e., a transfer by the DI to the AFN. Conversely, a transfer of funds or other property that decreases a DI's aggregate equity and debt investment in an AFN (or increases an AFN's aggregate equity and debt investment in a DI) is generally a "negative" transfer of capital, i.e., a transfer by the AFN to the DI.

§ B312–2 Summary.

Under § 312, transfers of capital by a DI to an AFN are defined in subsection (a), transfers of capital by an AFN to a DI are defined in subsection (b), certain transactions that are not considered transfers of capital are described in subsection (c), and the definition of "debt obligation" or "debt interest" is set forth in subsection (d). Generally, transactions occurring during base period years and transactions occurring after the effective date of the regulations are treated similarly in determining whether a transfer of capital has been made.

Under § 312(a), any transfer of funds or other property (without regard to the situs of the property) by, on behalf of, or for the benefit of a DI, directly or indirectly to, on behalf of, or for the benefit of an AFN, is a transfer of capital by the DI to the AFN. Also, any transaction or occurrence as a result of or in connection with which a DI directly or indirectly acquires or increases a debt or equity interest in an AFN, or the AFN directly or indirectly disposes of or reduces a debt or equity interest in the DI, is generally a transfer of capital by the DI to the AFN.

Under § 312(b), certain enumerated transactions or occurrences as a result of or in connection with which an AFN directly or indirectly acquires or increases a debt or equity interest in a DI, or the DI directly or indirectly disposes of or reduces a debt or equity interest in the AFN, are defined as transfers of capital by the AFN to the DI.

The language of subsection (a) of § 312 is substantially broader than that of subsection (b). Also, the specific transactions enumerated in subsection (a) as transfers of capital by a DI to an AFN do not purport to be all-inclusive; the transactions listed in subsection (b), however, are the only transactions which are considered transfers of capital by an AFN to a DI.

A transaction between a DI and an AFN involving immediate cash payment for goods sold or services rendered is not a transfer of capital. However, if a DI sells goods on credit or renders services on account to an AFN, DI has made a transfer of capital to the AFN, since DI's debt investment in the AFN is increased. Subsequent payment on account by the AFN is a transfer of capital by the AFN to DI, since DI's debt investment in the AFN is thereby decreased.

Aggregate transfers of capital by a DI to all AFNs in a scheduled area during a year, less aggregate transfers of capital by such AFNs to the DI during the year, is the "net transfer of capital" by DI to the scheduled area during such year. (See § 313.) A DI electing to be governed by schedular allowables under § 504 will report net transfers of capital on a schedular basis. A DI electing to be governed by the minimum allowable under § 503 will report net transfer of capital on a worldwide basis. A DI electing to be governed by § 507 will report a net transfer of capital to Schedule A and a net transfer of capital to Schedules B and C combined. A DI's net transfer of capital may be a positive or negative amount; it will be a positive amount if the aggregate of transfers of capital by DI to AFNs exceeds the aggregate of transfers of capital by AFNs to DI.

Particular transactions constituting transfers of capital during a year are not independently restricted under the regulations. A transfer of capital has significance only with respect to the computation, on an annual basis, of a DI's net transfer of capital and direct investment.

If proceeds of long-term foreign borrowing having been expended in transfers of capital (see § 313(d)(1)) or allocated to positive direct investment (see § 306(e)), repayment of the borrowing will be a transfer of capital by the DI. (See § 312(a)(7).) Positive direct investment attributable to such a transfer of capital may be authorized by § 1002, provided the certification requirements of that section have been met.

Since positive direct investment in Canada is generally authorized without limitation as to amount (see § 1102), transfers of capital by a DI to Canadian AFNs may be made in unlimited amounts without contravening the regulations. However, a transfer of funds or other property by a Canadian AFN to a non-Canadian AFN of the DI will, under certain circumstances, be treated as a transfer of capital by the Canadian AFN to the DI, and as a further transfer of capital by the DI to the non-Canadian AFN. (See § 505.) Furthermore, if an interest is acquired in a Canadian AFN from another AFN, the transfer of capital is deemed to have been made by a DI to the latter AFN; and if a DI acquires a Canadian AFN from any foreign national (other than another AFN), an appropriate portion of the transfer of capital by DI will be allocated among any non-Canadian second-tier AFNs owned by the Canadian AFN.

The net transfer of capital by a DI to unincorporated AFNs in any scheduled area during any period is computed in the manner set forth in § 313(b).

Transfers of funds or other property between AFNs of a DI are governed by § 505. In general, a transfer by one AFN to another AFN is treated as a transfer of capital by the transferor AFN to the DI, and a further transfer of capital in the same amount by the DI to the transferee AFN, provided that (a) at least one of the AFNs is an affiliate of the DI (i.e., the DI owns, alone or with other affiliates, a greater than 50 percent direct interest in the AFN) and (b) the transfer of funds or other property would be a transfer of capital under § 312(a) if actually made by the DI. (See § 505(a).) Extension of a trade credit for less than 1 year by one AFN to another AFN in the ordinary course of business normally will not involve a transfer of capital, provided neither AFN is Canadian. (See §§ 505(b) and 1103(c).)

§ B312-3 Valuation of transfers of capital.

The amount of transfer of capital is ordinarily determined in accordance with generally accepted U.S. accounting principles consistently applied, but in no event will the amount be less than the value of the transferred property at the time of the transfer as shown on the books and records of the transferor for financial reporting purposes. Thus, for example, if a transfer involves an export credit sale by a DI to an AFN, the amount of the transfer will ordinarily be the intercompany billing price. If transfers of property are valued by a DI at amounts that differ materially from the intercompany billing price or the export declaration value of the property (if applicable), the DI's annual report including the transfers should contain a note to such effect and an appropriate explanation of the basis therefor.

A transfer of capital arising from repayment of a foreign currency loan from a DI to an AFN or from an AFN to a DI must be reported in U.S. dollars at the rate of exchange prevailing at the time of repayment, regardless of intervening devaluation or revaluation of the foreign currency. Likewise, a transfer of capital arising from repayment by the DI of an AFN's foreign currency borrowing pursuant to the DI's guarantee thereof, or a transfer of funds by the DI to the AFN to enable the latter to repay a foreign currency borrowing, will be reported in U.S. dollars at the rate of exchange prevailing at the time of repayment. On the other hand, a transfer of capital arising from repayment by a DI of its own foreign currency long-term foreign borrowing will be charged at the dollar equivalent on the date of the borrowing, regardless of intervening devaluation or revaluation of the foreign currency. The effect of currency revaluation or devaluation on proceeds of long-term foreign borrowing is discussed in § B324-13.

§ B312-4 Acquisition of interest in an AFN.

Acquisition of an equity or profit interest in a foreign corporation, partnership or business venture (defined in § 304) by a person within the United States (defined in § 322) will involve a transfer of capital by such person under § 312(a)(1), or will be included in the calculation of the net transfer of capital to unincorporated AFNs under § 313(b), if:

The person from whom the acquisition is made is either a foreign national (defined in § 302), including the foreign corporation, partnership, or business venture in which the interest is acquired, or another person within the United States that is not, at the time of the acquisition, a DI in the foreign corporation, partnership, or business venture; and

The person making the acquisition is, at the time of the acquisition, a DI in the foreign corporation, partnership, or business venture under §§ 305, 905(b)(1) (members of an associated group treated as separate DIs) or 906(b)(3) (owners of a DI electing to be treated themselves as DIs), or becomes a DI as a result of or in connection with the acquisition.

If the acquisition is from a DI in the foreign corporation, partnership, or business venture, no transfer of capital is involved (§ 312(c)(1)). Also, under certain conditions, OFDI will specifically authorize positive direct investment attributable to a transfer of capital arising from an acquisition of an interest in a foreign corporation from non-DIs within the United States. A specific authorization may likewise be granted, under certain conditions, for positive direct investment attributable to creation of a DI-AFN relationship by acquisition of a foreign corporation's assets in exchange for property (e.g., stock) of the new DI, where the foreign corporation is to be liquidated in a related transaction by distribution of the property received (e.g., stock of the DI purchasing the assets) to persons within the United States.

If acquisition of an equity interest involves a transfer of capital by the DI, the transfer of capital will generally be deemed to have been made to the AFN in which the interest is acquired. There are, however, two exceptions to this rule. First, if the interest is acquired from another AFN of the DI, the transfer of capital will be deemed to have been made to the selling AFN. Second, if (a) the interest is acquired from an unaffiliated foreign national after December 31, 1967, (b) the AFN in which the interest is acquired first becomes an AFN as a result of the acquisition, and (c) such AFN has interests in other foreign corporations, partnerships or business ventures that become separate AFNs of the DI as a result of the acquisition, the transfer of capital will be allocated among the separate AFNs in a manner reasonably reflecting the respective values of each direct and indirect interest acquired. As a general rule, an allocation based on the respective book values of the foreign corporations, partnerships and business ventures involved will be acceptable.

Example 1. On June 1, 1969, a U.S. citizen and resident (X), who owns no voting stock in a foreign corporation, purchases 10 percent of the outstanding voting stock of a French corporation (C) from a citizen and resident of the United Kingdom for $1 million cash. C has no subsidiaries or branches in Schedule A or B that would constitute separate AFNs under § 304.

(a) Under the facts as presented, X has made a $1 million transfer of capital to C under § 312(a)(1).

(b) If X had purchased only 9 percent of the voting stock of C, no transfer of capital would be involved unless or until (i) additional stock acquisitions give rise to a DI-AFN relationship or (ii) OFDI determines that such relationship does, in fact, exist. (See §§ 305, 313(d)(2); see also § 304(b)(4).)

(c) If X purchased only 9 percent of the voting stock of C, but X were a member of an affiliated, associated or family group, and another member or members of the group owned or acquired an additional 1 percent or more of the voting stock of C, X's acquisition would have involved a transfer of capital. (See §§ 903-905.)

(d) If X had purchased only 9 percent of the voting stock of C, but X acquired an additional 1 percent or more of the voting stock of C between June 2, 1969, and May 31, 1970, X's net transfer of capital to Schedule C in 1969 or 1970 (depending on when the additional stock was acquired) would be increased by the $1 million expended in purchasing the 9 percent interest on June 1, 1969. (See § 313(d)(2).)

(e) If X had purchased 10 percent of C's outstanding preferred stock that has no voting rights (other than contingent voting rights not presently exercisable), instead of 10 percent of the voting stock, X would not have made a transfer of capital to C. (See § 304(b)(2)(i).)

(f) If X purchased 10 percent of the voting stock of C and subsequently purchased nonvoting preferred stock of C for $1 million, purchase of the preferred stock would involve a $1 million transfer of capital to C. (See § 312(a)(1).)

(g) If X purchased nonvoting preferred stock of C for $1 million and subsequently, within a 12-month period, purchased 10 percent of the voting stock of C, X's net transfer of capital to Schedule C during the year when the voting stock was acquired would be increased by the $1 million expended in purchasing the preferred stock. (See § 313(d)(2).)

(h) If X had purchased C's voting stock from its Panamanian AFN (P), instead of from the nonaffiliated United Kingdom resident, the purchase would involve a transfer of capital to P, since acquisition of an equity interest in an AFN from another AFN of the acquiring DI is treated as a transfer of capital to the selling AFN.

(i) If C had a wholly owned subsidiary in the United Kingdom (B) with net assets of $600,000, and a branch in Brazil (A) with net assets of $400,000 (calculated in accordance with § 313(b)), and C itself had net assets of $1 million (exclusive of debt and equity interests in B and A), X's purchase of 10 percent of C's voting stock from the United Kingdom resident for $1 million would involve a transfer of capital required to be allocated among A, B, and C. The $1 million transfer of capital made by X might be allocated $500,000 to C (i.e., 50 percent of $1 million), $300,000 to B (i.e., 30 percent of $1 million), and $200,000 to A (i.e., 20 percent of $1 million), or might be allocated among C, B, and A in any other manner fairly reflecting the interests acquired in C, B, and A.

(j) If C had a wholly owned subsidiary in the United Kingdom (B) with net assets of $600,000, and a branch in Brazil (A) with net assets of $400,000, and C itself had net assets of $1 million (exclusive of its interests in A and B), X's purchase of 10 percent of C's voting stock from a Panamanian AFN (P) for $1 million would involve a $1 million transfer of capital to P, since no allocation among AFNs is made when the acquisition is from another AFN of the acquiring DI.

(k) If X had inherited 10 percent of the outstanding voting stock of C, or had received the stock as an inter vivos gift from

a relative residing in the United Kingdom, X would not have made a transfer of capital, since he would not have transferred funds or other property in connection with the acquisition of the equity interest in C

(1) If X, after acquiring 10 percent of the outstanding voting stock of C, transfers equipment and machinery valued at $20,000 to C in exchange for additional stock of C, X has made a $20,000 transfer of capital to C. (See § 312(a)(1).)

(i) *Equity financing.* A DI's acquisition of an AFN from an unaffiliated foreign national in exchange for stock of the DI involves a transfer of capital to the AFN in the amount of the value of DI's stock on the date of the acquisition. Deferral, in whole or in part, of a charge to DI's allowables for positive direct investment attributable to such transfer of capital may be specifically authorized by OFDI under certain circumstances and subject to certain conditions. (See § B801 and Part I.E. of Appendix.)

(ii) *Contingent consideration.* In connection with a DI's acquisition of an AFN (other than through equity financing as described in (i) above), to the extent a payment by the DI is subject to the occurrence of a bona fide future contingency, such payment will involve a transfer of capital at the time when it is actually made. If the payment consists of stock or other property of the DI, the amount of the transfer of capital will be the value of the stock or other property at the time of the transfer.

(iii) *Unincorporated AFNs.* Acquisition of an interest in an unincorporated AFN will be reflected as an increase in DI's share of the AFN's aggregate net assets, and will have significance under the regulations only insofar as it contributes to yearend positive net transfer of capital or positive direct investment. Acquisition of an interest in an unincorporated AFN will be reflected as a transfer of capital under § 312(a)(1); similarly, it will have significance only insofar as a positive net transfer of capital or positive direct investment results. Although earnings and losses of incorporated AFNs are reflected as reinvested earnings and not in the determination of a DI's net transfer of capital, while earnings and losses of unincorporated AFNs are taken into account in determining a DI's net transfer of capital, the disparity arising from this difference in treatment of incorporated and unincorporated AFNs is minimized under the Program, since direct investment is the sum of the net transfer of capital plus reinvested earnings.

The following instances of similar or identical treatment of unincorporated and incorporated AFNs in transactions involving transfers of capital should be noted:

The same rules regarding valuation of the interest acquired apply, whether the AFN is unincorporated or incorporated.

The same rule and exceptions thereto apply to determination of the AFN to which the transfer of capital will be deemed made, whether the acquisition is of an equity interest or of a profit interest. Normally, the transfer of capital will be to the acquired AFN. However, if the acquisition is made from another AFN, the transfer of capital will be to the selling AFN. Thus, DI's acquisition of an unincorporated AFN from an incorporated AFN will be reflected as a transfer of capital to the incorporated AFN, and not as an increase in the DI's share of the unincorporated AFN's aggregate net assets. Nevertheless, for future transactions the DI will be deemed to have the share in such AFN's net assets as was acquired on the date of acquisition. Also, if (i) the interest in the AFN is acquired after December 31, 1967, (ii) the interest is not acquired from another AFN, (iii) the AFN in which the interest is acquired is not, at the time of acquisition, an AFN of DI but becomes an AFN as a result of or in connection with the acquisition, and (iv) such AFN owns an interest or interests in other foreign entities that become separate AFNs of DI as a result of or in connection with the acquisition, the transfer of capital will be allocated among all of the separate AFNs in a manner reasonably reflecting the respective values of each direct and indirect interest acquired.

In calculating the amount of net transfer of capital by a DI during any period, there is deducted an amount equal to proceeds of long-term foreign borrowing actually expended in transfers of capital to incorporated AFNs or actually transferred to unincorporated AFNs. (See § 313(d)(1).)

§ B312–5 Acquisition of an AFN's debt obligation.

Acquisition by a DI of an AFN's debt obligation, regardless of the nature of the transaction or occurrence giving rise to the obligation (e.g., a loan or advance by the DI to an AFN on open account or otherwise), involves a transfer of capital by the DI to the AFN in an amount equal to the amount of the obligation so acquired. If, however, a debt obligation of an AFN is acquired by a DI from another AFN, a transfer of capital will be deemed to have been made by the DI to the selling AFN in an amount equal to the cost of the obligation to the selling AFN; any gain or loss realized by the selling AFN will be included in calculating earnings of that AFN for the period involved.

The exemptions provided in § 312(c)(1) (relating to acquisitions from DIs) and § 312(c)(11) (relating to transfers of intangibles), and the provisions of § 313(d)(1) (relating to deduction of proceeds of long-term foreign borrowing), are applicable to acquisition of debt obligations as well as to acquisition of equity interests.

Example 2. The foregoing concepts are illustrated by the transactions considered below. In each instance, assume the DI has a 50-percent interest in a Mexican AFN (A).

(a) DI lends A $500,000 against A's 3-year note and advances an additional $500,000 to A on open account. DI has made two $500,000 transfers of capital to A under § 312(a)(1). Repayments of each indebtedness by A will involve transfers of capital from A to DI under § 312(b)(3), in the amounts repaid.

(b) DI sells merchandise to A for resale and bills A for $100,000 payable within 60 days. DI has made a $100,000 transfer of capital to A under § 312(a)(1). A repays DI during the same reporting period. The transfer of capital under § 312(b)(3) from A to DI will offset DI's transfer of capital to A, and no net transfer of capital will result from the transactions. It should be recognized that the transfer of capital from DI to A in this instance does not arise from the transfer of merchandise, but rather from the extension of credit involved in the transaction. If the total amount of credit outstanding in connection with the sale of merchandise by a DI to its AFNs increases during a year, OFDI may issue a specific authorization for positive direct investment attributable to such increase in outstanding credit, subject to certain conditions (see Part I.C. of Appendix hereto).

(c) DI ships merchandise on consignment to A for resale. A is to pay DI $100,000 when all the merchandise is sold. The shipment has the same effect under the regulations as a sale on credit, and involves a $100,000 transfer of capital by DI to A at the time of consignment.

(d) DI renders management services to A, as a result of which A owes DI $10,000. DI has made a $10,000 transfer of capital to A under § 312(a)(1). Repayment of the indebtedness will be a transfer of capital from A to DI under § 312(b)(3).

(e) DI licenses A to manufacture and sell certain products for a royalty of 5 percent of A's gross sales of such products. Any accrual of unpaid royalties will involve a transfer of capital under § 312(a)(1).

(f) A foreign bank lends $100,000 to A against A's 3-year note bearing interest at the prevailing rate. DI's acquisition of the note from the bank for $95,000 will involve a $95,000 transfer of capital by DI to A under § 312(a)(1). Repayment of the note by A will involve a $100,000 transfer of capital by A to DI under § 312(b)(3).

(g) A declares a dividend to DI that is not actually remitted on the date payable. DI has acquired a debt obligation of A, and has made a transfer of capital to A under § 312(a)(1). Actual payment of the dividend will be a transfer of capital by A to DI under § 312(b)(3). Note that for purposes of calculating reinvested earnings, however, the dividend is deemed to have been paid on the date it becomes payable. (See § 306(d)(2).)

(h) Renewal of a loan from DI to A in a previous year will not involve a transfer of capital, since renewal is not deemed repayment of the old obligation or creation of a new obligation. However, accrual of unpaid interest on the loan will involve a transfer of capital to A under § 312(a)(1). Subsequent payment of such accrued interest will be a transfer of capital by A to DI under § 312(b)(3).

(i) DI sends A certain equipment to be repaired by A and returned to DI. No transfer of capital is involved.

(j) Semiprocessed goods or raw materials are shipped by DI to A for processing or testing, and such goods or materials (title to which is retained by DI) will be returned to DI after processing or testing. No transfer of capital is involved. Payments by DI for the services rendered by A will not involve transfers of capital, but may be reflected in earnings of A.

§ B312–6 Contributions by a DI to capital of AFNs.

Section 312(a)(2) is intended to cover a transfer of funds or other property by a DI to an AFN that is not reflected on the books and records of the DI or the AFN as either an acquisition of equity interest by the DI or creation of a debt obligation from the AFN to the DI. Thus, for example, if no stock is issued and no debt obligation is created in return for machinery shipped by a DI for use of an AFN, the DI will be deemed to have made a contribution of capital to the AFN (a transfer of capital under § 312(a)(2)) in the amount of the value of the machinery.

If marketable securities owned by AFN increase in value, or fixed assets of an AFN are reappraised to increase their value, no transfer of capital to the AFN will result. Similarly, no transfer of capital will result if an incorporated AFN capitalizes retained earnings.

Expenses incurred by a DI in rendering services primarily for the benefit of an incorporated AFN will not result in transfers of capital, under § 312(a)(2) or otherwise, provided such expenses are charged to the DI under generally accepted U.S. accounting principles consistently applied. If such expenses are charged to the AFN and the DI is not compensated therefor, transfers of capital under § 312(a) (1) or (2) will result.

§ B312–7 Repayment of DI's indebtedness to an AFN.

Any repayment by a DI of indebtedness to an AFN will involve a transfer of capital by the DI to the AFN under § 312(a)(3), provided the AFN is still an AFN of the DI at the time of payment.

If indebtedness is created in a transaction involving a transfer of capital from an AFN to a DI under § 312(b)(1), and is repaid by the DI during the same compliance period, no net transfer of capital will result.

§ B312–8 Reduction of an AFN's equity interest in a DI.

Under § 312(a)(4), reduction of an AFN's equity interest in a DI as a result of a redemption of stock, liquidating dividend (whether or not any part is allocable to earnings of the DI), or like transaction is a transfer of capital to the AFN. Thus, for example, if an AFN purchases stock of a DI from the DI for $1 million and the DI subsequently redeems the stock for $1 million, the AFN's purchase involves a $1 million transfer of capital to the DI under § 312(b)(1) and the DI's redemption involves a $1 million transfer of capital to the AFN under § 312(a)(4).

§ B312–9 Disposition of an equity or debt interest in a DI held by an AFN.

Whereas § 312(a)(4) encompasses those cases where an equity interest in a DI held by an AFN is reduced or liquidated by virtue of a redemption, liquidating dividend or like transaction, § 312(a)(5) covers those cases where such an equity or debt interest of a DI is sold or otherwise transferred by an AFN to another person. Such disposition will involve a transfer of capital by the DI to the AFN only if (a) the interest is sold back to the DI, or (b) the selling AFN is an affiliate of the DI (as defined in § 903(a)), or (c) the interest is sold to another AFN that is an affiliate of the DI. (See § 312(c)(2).) For example, an AFN that is an affiliate of a DI purchases stock of the DI from the DI for $1 million and subsequently sells the stock to an unaffiliated foreign national for $1.2 million. The AFN's purchase involves a $1 million transfer of capital from the AFN to the DI under § 312(b)(1). Subsequent sale of the stock involves a $1 million transfer of capital to the AFN under § 312(a)(5), and a $200,000 capital gain to be reflected in calculation of the AFN's earnings.

§ B312–10 DI's satisfaction of an AFN's debt obligation.

Under § 312(a)(6), any payment by a DI to satisfy an obligation in respect of which an AFN is the primary obligor will involve a transfer of capital by the DI to the AFN. Thus, for example, payment by a DI of an AFN's rent, salary expenses, advertising expenses, legal fees, auditing fees, or other expenses will involve transfers of capital to the AFN. Similarly, if a DI guarantees an obligation owed by an AFN to another person, payment by the DI of any part of the principal amount of such obligation and payment of interest with respect thereto that has accrued prior to the AFN being relieved of or defaulting upon the obligation, will involve a transfer of capital by the DI to the AFN.

The making of a guarantee by a DI does not itself involve a transfer of capital. (See § 312(c)(7).) However, a DI's assumption of an AFN's obligation in a transaction in which AFN is relieved of liability will involve a transfer of capital by the DI to the AFN, while subsequent payments of the obligation will not involve transfers of capital. Payment by a DI of interest on the obligation of an AFN after the DI has become primarily liable for the obligation does not involve a transfer of capital by the DI to the AFN. (See § 312(c)(8).)

§ B312–11 Repayment of a DI's long-term foreign borrowing.

Repayment by a DI of a long-term foreign borrowing involves a transfer of capital by the DI under § 312(a)(7), if proceeds of the borrowing were:

Expended by DI in making a transfer of capital on or after January 1, 1965; or

Allocated to a transfer of capital made by the DI during 1968; or

Allocated to positive direct investment made during any year commencing with 1969.

A transfer of capital under § 312(a)(7) is deemed to have been made to the scheduled area in which proceeds of the DI's borrowing were expended or are allocated at the time of the repayment. Positive direct investment attributable to a transfer of capital under § 312(a)(7) is generally authorized by § 1002(a), subject, in certain instances, to the certification requirements of § 1002(b). See § B324–11.

§ B312–12 Lease of property by a DI to an AFN.

Under § 312(a)(8), a lease of property by a DI to an AFN is considered a transfer of capital to the AFN if the property has a useful life at the time of the lease of 1 year or more, and is not required or expected to be returned to the DI in less than 1 year. This rule recognizes that long-term leases are substantially similar in economic effect to outright transfers. Accordingly, such long-term leases of property by a DI to an AFN will be considered transfers of capital (in the amount of the market value of the property at the time of lease), without regard to the nature or expected use of the property, while a transfer of capital from the AFN to the DI will be recognized under § 312(b) when the property is returned to the DI in the amount of the market value of the property at such time.

Payment of current rentals under such a long-term lease will not be considered a transfer of capital by the AFN to the DI (§ 312(c)(9)), since rental payments are deducted in calculating the AFN's earnings. A sublease by a DI to an AFN will constitute a transfer of capital in any year only to the extent that the annual rental paid by the AFN to the DI is less than that paid by the DI to the lessor for the same year.

Example 3. DI leases machinery and equipment to an incorporated AFN (X) for a 10-year term for a rental of $1,000 per year. The machinery and equipment have an aggregate value of $12,000 at the time the lease is made. At the end of 10 years, the machinery and equipment will be returned to DI, at which time it will have a value of $2,000. DI has made a $12,000 transfer of capital to X at the time of the lease and X will make a $2,000 transfer of capital to DI when the property is returned. The $1,000 annual rental payments will not constitute transfers of capital from X to DI.

Example 4. On January 1, 1970, DI leases an office building in Germany from an unaffiliated foreign national for a term of 5 years at an annual rental of $30,000. On the same date DI subleases the property to its German AFN (C) for the same term at an annual rental of $20,000. DI has made a transfer of capital to C of $10,000 for 1970. DI will be charged with a transfer of capital in the same amount for each remaining year of the sublease.

The treatment of leases or subleases between AFNs is illustrated in § B505–5.

§ B312–13 Inducements for loans to a DI or to an AFN.

Under § 312(a)(9), a DI's pledge, hypothecation, or transfer of foreign balances (defined in § 203(a)(1)), or of equity securities of a foreign corporation (other than equity securities of an AFN), will involve a transfer of capital by the DI if the pledge, hypothecation, or transfer is made to or with a foreign national in connection with a loan to an AFN or a loan to the DI that qualifies as long-term foreign borrowing and the proceeds of which are invested in an AFN. The amount of the transfer of capital for purposes of § 312(a)(9) is the lesser of (a) the value of the foreign balances or equity securities or (b) the amount borrowed by or invested in the AFN. The transfer of capital occurs as of the date the funds are borrowed or invested in the AFN.

For purposes of § 312(a)(9), proceeds of long-term foreign borrowing are deemed invested in an AFN if such proceeds are expended in making a transfer of capital to such AFN or are allocated to positive direct investment in any one or more scheduled areas.

A pledge or hypothecation constituting a transfer of capital under § 312(a)(9) will, upon release, be considered a transfer of capital to the DI under § 312(b) in the amount of the DI's initial transfer of capital. If, on the other hand, the property pledged or hypothecated is not released but is applied to payment of the secured indebtedness, no additional transfer of capital by the DI will result therefrom.

Example 5. DI deposits $1 million (cash or securities) with a foreign bank as an inducement (or collateral) for an $800,000 loan by the bank to an AFN (X). The deposit

is an $800,000 transfer of capital by DI to X. If cash was deposited, only the $200,000 excess over the amount of the loan would constitute a liquid foreign balance (see § B203–4). The result would be the same if the deposit were made as collateral for an $800,000 long-term borrowing by DI from the foreign bank and the proceeds of the borrowing were loaned by DI to X. (The loan by DI to X would involve a transfer of capital, with a corresponding deduction from net transfer of capital by operation of § 313(d) (1).) Similarly, if the collateral itself represented proceeds of a long-term foreign borrowing, a deduction under § 313(d) (1) would also be taken in respect of the transfer of capital involved in the pledge. No transfer of capital under § 312(a) (9) would be involved if the pledge or deposit were made as collateral for a short-term borrowing by DI. DI's loan of the proceeds of the short-term borrowing to X would involve a transfer of capital, but no deduction under § 313(d) (1) could be taken.

Example 6. In September 1970, DI pledges $1 million of equity securities of a foreign corporation with a foreign bank as collateral for a $1 million long-term foreign borrowing by DI from such bank. For the year 1970, DI allocates $400,000 of the proceeds of such borrowing to positive direct investment in Schedule C and $300,000 to Schedule B under § 306(e). DI repatriates the proceeds as of yearend in accordance with §§ 203(d) (1) and 306(e) (2). Under § 312(a) (9), DI has made a transfer of capital of $400,000 to Schedule C and $300,000 to Schedule B. When the pledge is withdrawn, DI will report a negative transfer of capital from Schedule C of $400,000 and from Schedule B of $300,000. When DI repays the borrowing, there will be transfers of capital of $400,000 to Schedule C and $300,000 to Schedule B.

Example 7. DI deposits $1 million with the home office of a domestic bank, as security for a $1 million loan by a foreign branch of the bank to an AFN (X). The deposit is not a transfer of capital, since it was not placed with a foreign national, but does constitute a guarantee by DI of X's borrowing. See § B1001–3. (In this connection, positive direct investment attributable to a subsequent transfer of capital pursuant to DI's guarantee (under § 312(a) (6)) will be authorized by § 1002(a) (5), provided DI has complied with the certification requirements of § 1002(b).)

Example 8. DI pledges equity securities of U.S. corporations, together with equity securities of an AFN, with a foreign bank as collateral for a loan by the bank to another AFN (X) or, alternatively, as collateral for a long-term borrowing by DI from the foreign bank. The pledge is not a transfer of capital in either instance, since the securities pledged are not those of an unaffiliated foreign national. (However, the pledge of securities as collateral for the loan to X would be considered a guarantee by DI of X's obligation.)

Example 9. DI deposits $1 million with a foreign bank pursuant to an arrangement whereby the bank lends $1 million to an AFN (X). The deposit constitutes a $1 million transfer of capital by DI to X, whether or not the bank has a legal right to resort to the deposit should there be default by X. However, if DI's deposit was a deposit in the ordinary course of business, there would be no transfer of capital, in the absence of an agreement that the funds would stay on deposit while the loan was outstanding, and the funds on deposit would constitute a liquid foreign balance.

§ B312–14 Indirect transfers by a DI to an AFN.

It is important to recognize that § 312 (a) focuses on the substance rather than the form of transactions. Transactions that do not come precisely within the language of any of the subparagraphs of § 312(a), but nevertheless are undertaken by a DI for the benefit of an AFN, may involve a transfer of capital by the DI to the AFN even though the transactions are effected through nominees, financial conduits or other intermediaries. While the outcome of each transaction will depend on the specific facts and circumstances involved, DIs should recognize the general rule that transactions effected indirectly with an AFN will be treated under the regulations as if effected directly by the DI.

§ B312–15 Transfers of capital by an AFN to a DI.

The provisions of § 312(b), relating to transfers of capital by an AFN to a DI, are roughly parallel to the provisions of § 312(a) (1)–(6), relating to transfers from a DI to an AFN. Thus, with certain exceptions, any transaction that would involve a transfer of capital by a DI to an AFN under subparagraphs (1) through (6) of § 312(a) will involve a transfer of capital by the AFN to the DI under § 312(b) if the position of the parties is reversed (e.g., the AFN, rather than the DI, is the lender). The following points, however, deserve specific mention.

(i) *Acquisition by AFN of interest in DI.* Under § 312(a) (1), acquisition of an equity or debt interest in an AFN will ordinarily involve a transfer of capital by the DI, regardless of the identity of the person from whom the interest is acquired; the only exception is an acquisition from another DI. Under § 312(b), however, acquisition by an AFN of an equity or debt interest in a DI involves a transfer of capital by the AFN only if the person from whom the interest is acquired is the DI itself (§ 312(c) (3)). Thus, for example, if an AFN lends $100,000 to a DI, a $100,000 transfer of capital from the AFN to the DI is involved under § 312(b) (1). If the loan were made to the DI by a bank and the AFN subsequently acquired the debt obligation, no transfer of capital to the DI would be involved; however, satisfaction of the obligation by the DI would involve a $100,000 transfer of capital to the AFN under § 312(a) (3).

(ii) *Disposition by DI of interest in AFN.* Disposition by an AFN of an equity or debt interest in a DI involves a transfer of capital by the DI under § 312(a) (5) if the selling AFN is an "affiliate" (defined in § 903(a)), or if the transferee is the DI or another AFN that is an affiliate of the DI. Under § 312(b) (5), however, disposition by a DI of an equity or debt interest in an AFN involves a transfer of capital to the DI only if the transferee is either (a) a foreign national or (b) a domestic bank or nonbank financial institution subject to the Federal Reserve Board's Voluntary Foreign Credit Restraint Program and the transfer is charged against the ceiling of such bank or is treated as a covered asset of such institution under that program (§ 312(c) (4)). Thus, if a DI lends $100,000 to an AFN (resulting in a $100,000 transfer of capital to the AFN) and discounts the AFN's note for $98,000 with a domestic bank, a $98,000 transfer of capital by the AFN to the DI will result if the bank is subject to the Voluntary Foreign Credit Restraint Program and the note is charged against the bank's ceiling under that program. The result would be the same if the note is discounted with a foreign bank (including a foreign branch of a domestic bank) or another foreign national. If the DI's disposition of the note did not involve a transfer of capital under § 312(b) (5), satisfaction of the note by the AFN would involve a transfer of capital to the DI.

When a DI disposes of a debt or equity interest in an AFN (under circumstances constituting a transfer of capital to the DI under § 312(b) (5)), the transfer of capital to the DI is the full value of consideration received therefor, whether the transaction results in a gain or a loss to the DI.

A transfer of capital under § 312(b) (5) will generally be deemed to have been made to the DI by the AFN that issued the debt or equity interest disposed of. There are, however, two exceptions to this rule. First, if the debt or equity interest in an AFN is sold by a DI to another AFN, the transfer of capital is deemed to have been made to the DI by the latter AFN. Second, if an equity interest in an AFN is both acquired from and sold to unaffiliated foreign nationals after December 31, 1967, and at the time of the disposition the AFN involved has subsidiaries or branches in other scheduled areas that are separate AFNs under § 304, the transfer of capital to the DI should be allocated among all such AFNs in a manner fairly reflecting the respective values of all direct and indirect interests in the AFNs disposed of. As a general rule, an allocation based on the book value of each AFN will be acceptable.

Sale of an AFN to an unaffiliated foreign national during a year does not affect any transfers of capital between the DI and the AFN preceding the date of disposition. Thus, if a DI makes a $1 million transfer of capital to an AFN in the beginning of the year and in December sells all equity interest in the AFN to an unaffiliated foreign national for $900,000 in cash, the DI has made a positive net transfer of capital of $100,000 to the scheduled area of the AFN (assuming no other relevant transactions during such year).

(iii) *Accounts receivable.* If an AFN assigns accounts receivable of unaffiliated persons to the DI in satisfaction of a debt obligation of the AFN held by the DI, a transfer of capital to the DI will be recognized under § 312(b) (3) when the accounts are paid or are sold by the DI to an unaffiliated foreign national (or to a domestic bank or nonbank financial institution subject to the Federal Reserve Program and the transfer is charged under such program) in the amount received by the DI.

§ B312–16 Sale of an AFN to an unaffiliated foreign national with deferred payment.

If a DI receives a debt obligation of an unaffiliated foreign national as consideration for an interest in the AFN disposed of, no transfer of capital to the DI

will result from the disposition until the obligation is paid or is sold by the DI to another unaffiliated foreign national for cash or other property (other than a debt obligation), or to a domestic bank or nonbank financial institution subject to the Federal Reserve Voluntary Foreign Credit Restraint Program and the transfer is charged against the ceiling of such bank or is treated as a covered asset of such institution under that program.

Example 10. DI sells 50 percent of the stock of a wholly owned French corporation (C) to an unaffiliated foreign national (F) for $1 million in cash. C has no subsidiaries or branches outside Schedule C. DI had originally acquired all of the stock of C for $100,000.

(a) Under the facts as presented, the sale involves a $1 million transfer of capital from C to DI, pursuant to § 312(b)(5).

(b) If F had given DI a note for $1 million instead of cash, the transfer of capital from C to DI would occur when the note is paid or is sold by DI to another unaffiliated foreign national for cash or other property (other than a debt obligation).

(c) If F had been an AFN of DI located in Schedule B, the sale of C for cash would involve a $1 million transfer of capital from F to DI.

(d) If F had been an AFN of DI located in Schedule B and paid DI with a note for $1 million, DI's exchange of stock in C for a debt obligation of F would not involve a transfer of capital. However, payment of the note by F would involve a transfer of capital from F to DI, pursuant to § 312(b)(3).

(e) If C had a subsidiary in Schedule A (X), a branch in Schedule B (Y) that was a separate AFN of DI, and a subsidiary in Schedule C (Z), the transfer of capital to DI involved in a cash sale of C to an unaffiliated foreign national would be allocated among C, X, Y, and Z in a manner reasonably reflecting the respective values of each direct and indirect interest disposed of by DI. If C were sold to another AFN for cash, no allocation of the transfer of capital to DI would be made among the second-tier AFNs; the transfer of capital under § 312(b)(5) would be from the acquiring AFN to DI.

(f) The fact that DI had originally acquired C with proceeds of a long-term foreign borrowing would not alter any of the above results.

§ B312–17 Triangular and parallel financing.

Triangular loan arrangements are generally those in which a loan by a DI to an unaffiliated foreign national is the basis for, or is otherwise associated with, a loan by such foreign national to an AFN. Parallel loan arrangements are generally those in which a loan by a DI to a U.S. subsidiary of an unaffiliated foreign national is the basis for, or is otherwise associated with, a loan by such foreign national to an AFN.

As stated in the instructions for specific authorizations issued September 11, 1970 (see Part I.G. of Appendix hereto), each such type of arrangement will generally give rise to a transfer of capital by the DI to the AFN at the time and in the principal amount of the foreign loan to the AFN. However, such instructions indicate that relief will be available, subject to certain conditions, in the form of a specific authorization to exclude the current charge against allowable resulting from such transfer of capital.

§ B312–18 Certain transactions not involving a transfer of capital; § 312(c).

Section 312(c) sets forth particular transactions not deemed to involve transfers of capital although technically encompassed by the language of § 312 (a) or (b).

Under § 312(c)(1), acquisition by a DI of a debt or equity interest in an AFN (as described in § 312(a)(1)) will not be deemed to involve a transfer of capital if the acquisition is made from another DI. The selling party must be a DI at the time of the sale, but may cease to be a DI as a result of the transaction. Under certain conditions, OFDI may specifically authorize positive direct investment attributable to acquisition by a DI of an interest in an AFN from a person within the United States that is not a DI (i.e., a person holding less than 10-percent interest in the foreign national). See § B312–4.

Under § 312(c)(1)(i), if a DI acquires an equity interest in an AFN from another DI, the divesting DI's direct investment in the year of the acquisition and during 1965–66 is deemed to have been made by the acquiring DI, to the extent allocable to the interest transferred. Similarly, the divesting DI's share in the AFN's earnings or losses prior to acquisition is attributed to the acquiring DI, to the extent allocable to the interest transferred. In calculating the divesting DI's direct investment in the AFN, deductions taken pursuant to §§ 203(d)(2) and (3), 306(e), and 313(d)(1) must be disregarded unless the acquiring DI assumes the obligation to repay the long-term foreign borrowing in connection with which the deductions were taken. The acquiring and divesting DIs must file revised Forms FDI–101 and FDI–102F for the year preceding the year of acquisition, reflecting the above treatment, in order for the acquisition to be covered by § 312(c)(1).

As provided in § 312(c)(1)(ii), an acquisition of an AFN as the result of a combination (by merger or otherwise) of two or more DIs will be treated as though the surviving DI were an acquiring DI under § 312(c)(1)(i) and the other parties to the transaction were divesting DIs. In the case of merger or other combination of DIs, OFDI should be consulted as to the applicability of any outstanding specific authorizations that were issued to such DIs prior to the merger.

If the acquiring DI assumes an obligation to repay long-term foreign borrowing that was certified under Subpart J by the divesting DI, the acquiring DI must file a revised standard certificate Form FDI–106 (together with the revised Forms FDI–101 and FDI–102F) in order for repayment of the borrowing to be authorized under § 1002(a). See § B1002–2 for discussion of certification on Form FDI–106. The revised certificate should identify the acquiring DI and the original certificate being replaced and should indicate that it is being filed in connection with an acquisition under § 312(c)(1). The information contained in Items II through V (Items 1–7 on prior Form FDI–106), including the date of the borrowing, of Form FDI–106 would presumably remain the same. As to Item VI (Item 8 on prior Form FDI–106) (basis for certification), the acquiring DI may rely on the reasons stated by the divesting DI, if at the time of the acquisition the basis for such certification is still valid with respect to the remaining life of the borrowing.

If the divesting DI certified on the basis of Item VI(a)(2) (or Item 8A 2 or 3 on prior Form FDI–106), the acquiring DI may, nevertheless, certify on the basis of Item VI(b)(1).

Example 11. DI(1) made a long-term foreign borrowing in 1969 and certified on the basis that the borrowing would be refinanced. In 1970, DI(1) merges into DI(2), which has substantial allowables that would be available for repayment of the borrowing. In filing revised Form FDI–106, DI(2) may elect instead to certify on the basis of Item VI(b)(1).

However, if the acquiring DI does not have sufficient allowables to justify certification originally made on the basis of Item VI(b)(1), the revised Form FDI–106 must state some other basis.

Example 12. DI(1), a § 504(a) reporter, made a long-term foreign borrowing in 1969 of $2 million, payable in full in 1972, which DI expended in Schedule B and certified under Subpart J on the basis of a $2,500,000 Schedule B historical allowable. In 1970 DI (1) is merged into DI(2), which had substantial negative direct investment in Schedule B during 1965 and 1966, and as a result, the surviving DI has a Schedule B historical allowable of only $500,000. DI(2) may not file the revised Form FDI–106 on the basis of Item VI(b)(1).

Certificates filed on the basis of the § 503 or § 507 allowable will continue to be valid for purposes of Subpart J even though the DIs relying on such allowables merge and consequently are entitled to only one such allowable.

Example 13. DI(1) and DI(2) each made a long-term foreign borrowing of $1 million in 1969 payable in 1971 and certified under Subpart J on the basis of their § 503 allowables. The borrowings were expended in Schedule C. In 1970, DIs (1) and (2) merge. Although the surviving entity will be entitled to only one § 503 or § 507 allowable, repayment of both borrowings in 1971 will be authorized under Subpart J as originally certified.

If a DI acquires a debt obligation of its AFN from another DI in the same AFN, no transfer of capital is involved and no allocation of direct investment between the DIs is made.

Pursuant to § 312(c)(2), disposition of an equity or debt interest in a DI by an AFN involves a transfer of capital by the DI to the AFN under § 312(a)(5) only if (a) the interest is sold back to the DI; or (b) the selling AFN is an affiliate of the DI, or (c) the interest is sold to another AFN that is an affiliate of the DI.

Pursuant to § 312(c)(3), acquisition by an AFN of an equity or debt interest in a DI is not a transfer of capital to the DI under § 312(b)(1) unless the acquisition is from the DI.

Pursuant to § 312(c)(4), transfer by a DI of an equity or debt interest in an

AFN is not a transfer of capital by the AFN to the DI under § 312(b)(5) unless the transfer is made to a foreign national or is charged under the Federal Reserve Board's Voluntary Foreign Credit Restraint Program.

Under § 312(c)(5), increase of equity interest in an incorporated AFN resulting from reinvestment of the AFN's earnings does not involve a transfer of capital. Reinvestment of the DI's share of an incorporated AFN's earnings does, however, constitute an element of direct investment, as defined in § 306(a).

Under § 312(c)(6), increase or decrease in the value of an AFN's assets resulting from reappraisal of such assets does not involve a transfer of capital.

Under § 312(c)(7), a DI's guarantee of borrowing by an AFN does not itself involve a transfer of capital. (For a definition of the term "guarantee", see § 1001(c).) However, payments pursuant to a guarantee may involve transfers of capital under § 312(a)(6) or (b)(6). Positive direct investment attributable to a DI's performance under a guarantee of an AFN's obligation will be authorized in excess of applicable allowables, provided that in the case of a guarantee made on or after January 1, 1968 the DI has complied with applicable certification requirements of § 1002(b).

Under § 312(c)(8), payment by the primary obligor of interest currently due, or fees or commissions in connection with borrowings, does not involve a transfer of capital. Prepayments of interest pursuant to customary lending practices or commercial transactions likewise do not involve transfers of capital. (The fees or commissions referred to above include commitment and termination fees, premiums, underwriters' commissions, original issue discounts, broker-dealer fees, legal and accounting fees, and other like items.) Thus, for example, an AFN's payment of interest on a loan from a DI, or vice versa, does not involve a transfer of capital if the interest is paid when due. If not paid when due, however, an additional debt obligation will be created, involving a transfer of capital from the obligee to the obligor under § 312(a)(1) or (b)(1) and a transfer of capital in the opposite direction under § 312(a)(3) or (b)(3) when the additional obligation is paid. It should be noted that the exemption under § 312(c)(8) applies only to the primary obligor. Thus, payments by a DI, pursuant to a guarantee of an AFN's borrowing, of interest, commissions and fees owed by the AFN, are transfers of capital to the AFN under § 312(a)(6). See § B312-10.

Under § 312(c)(9), payment of rental currently due under a lease, or prepayment of rental if customary under leases of the type involved, does not involve a transfer of capital. However, a lease of property by a DI to an AFN may involve a transfer of capital under § 312(a)(8).

Under § 312(c)(10), payment of royalties currently due by a licensee does not involve a transfer of capital, absent circumstances indicating that such payments are essentially equivalent to transfers of capital and are merely disguised as royalty payments. Likewise, prepayment of royalties will not be treated as transfers of capital if such prepayments are customarily made by licensees under similar license agreements. As in the case of interest payments, the exemption under § 312(c)(10) applies only to payments by a primary obligor.

Section 312(c)(11) provides, as a general rule, that a transfer of any of the following items does not involve a transfer of capital by a DI to an AFN, or vice versa: Patents, copyrights, trademarks, trade names, trade secrets, technology, proprietary processes, proprietary information, and similar intangibles, and any rights, interests, contracts or applications relating to the foregoing items.

"Trade secrets, technology, proprietary processes, proprietary information and similar intangibles" as used in § 312(c)(11) means information or know-how in which the DI has a legally protected, proprietary right. The performance of services will not qualify under § 312(c)(11) unless such services are ancillary to a transfer of property which qualifies under § 312(c)(11). Generally, OFDI will consider a transfer of information or know-how to involve a transfer within the meaning of § 312(c)(11) if the information or know-how would qualify as property for purposes of tax-free exchange treatment under section 351 of the Internal Revenue Code (1954).

The exemptions of § 312(c)(11) are applicable regardless of the form of the transfer, or the consideration received in exchange therefor. However, DI's transfer of any of the foregoing intangibles to an AFN on or after January 1, 1968, is considered a transfer of capital by the DI if (a) the transfer represents a substantial departure from a previously established practice of the DI with respect to exploitation of intangibles of the type transferred, and (b) the intangible transferred was, prior to the transfer, a substantial source of royalty or other like fixed or determinable, annual or periodic, income.

If a post-January 1, 1968, transfer of an intangible does not involve a transfer of capital because of the foregoing rule, no deduction for amortization or any like charge with respect to the intangible transferred may be made against earnings in calculating the transferee AFN's earnings. Also, even if a transfer of intangibles does not involve a transfer of capital, a person within the United States making such transfer may become a DI if a 10-percent interest (as defined in § 304) in the foreign enterprise is received in exchange for the transfer.

The determination whether transfer of an intangible represents a substantial departure from previously established practice and whether the intangible transferred was a substantial source of royalty or like income will depend on the facts and circumstances in each case.

§ B312–19 Unenumerated transactions not involving a transfer of capital.

Certain other transactions not enumerated in § 312(c) will be deemed not to involve transfers of capital between a DI and an AFN, even though a foreign enterprise may become or cease to be an AFN as a result of the transactions. However, if a foreign enterprise ceases to be an AFN as a result of any such transaction, this will not change the amount of direct investment chargeable to the DI during the base period in the appropriate scheduled area. The transactions referred to are as follows:

Acquisition by a DI, from an AFN or unaffiliated foreign national, of stock or assets of a foreign corporation, partnership, or business venture in exchange for stock of an AFN;

Contribution by a DI of stock or assets of an AFN to capital of another AFN;

Merger of one incorporated AFN into another incorporated AFN of the same DI, or consolidation of AFNs of the same DI, or merger or consolidation of an AFN into or with the DI;

Division of an AFN into two or more entities; and

Recapitalization of an AFN involving an exchange of stock for stock, debt for debt, stock for debt, or debt for stock.

A DI will not be exempt from recognizing a transfer of capital in a stock-for-stock/assets acquisition as described in the first category above if the exchange in effect results in an acquisition for cash.

Example 13. During 1970, DI organizes an incorporated AFN (A) in Schedule A and contributes $20 million cash to the capital of A. DI then enters into an agreement with X, a foreign national, whereby DI acquires from X all of the stock of a French corporation (C) in Schedule C in exchange for all of the stock of A. Thereafter, X causes A to be dissolved and the assets of A ($20 million cash) to be distributed to itself. This transaction is not a bona fide exchange of stock for stock, exempt from §§ 312 and 505, but is equivalent to an acquisition of C for cash, and constitutes a transfer of capital from A to DI under § 312(b) and a transfer of capital from DI to C under § 312(a) of $20 million.

A DI will not be deemed to have made a transfer of capital to its AFN if the DI deposits funds with a foreign government or a foreign bank pursuant to an import deposit law, regulation or requirement of the foreign government in connection with exports made by the DI to the AFN. The foregoing rule applies only if the deposit is not returned or returnable to the AFN or otherwise carried on the books and records of the AFN as an asset or a debt obligation to the DI.

§ B312–20 International construction projects.

Bid preparation expenditures in connection with international construction projects are to be excluded from computation of a DI's net transfer of capital, whether such expenditures have been incurred by the DI or it has advanced funds for such purpose to an AFN. However, such expenditures may not subsequently be deducted in computing earnings of incorporated AFNs or aggregate net assets of unincorporated AFNs. Specific authorizations with respect to transfers of capital to foreign construction projects may also be granted in appropriate circumstances under § 801.

B313—Net Transfer of Capital

§ B313-1 Introduction.

Net transfer of capital as defined in § 313(c) is one of the components of direct investment (§ 306). Net transfer of capital under § 313(c) consists of:

The net transfer of capital to incorporated AFNs in a scheduled area (§ 313(a)); plus

The net transfer of capital to unincorporated AFNs in the scheduled area (§ 313(b)); less

Expended proceeds of long-term foreign borrowing in the scheduled area (§ 313 (d)(1)).

If the calculation produces a positive result, the DI has made a "positive net transfer of capital" to the scheduled area; if a negative figure results, the DI has made a "negative net transfer of capital" to the scheduled area.

Section 313(d)(2) provides that transfers in connection with the acquisition of AFNs, including transfers during the 12-month period preceeding any such acquisition, must be included in computing net transfer of capital.

Net transfer of capital to incorporated AFNs under § 313(a) consists of all § 312 (a) transfers of capital from the DI to AFNs, less all § 312(b) transfers from AFNs to the DI. The net transfer of capital to unincorporated AFNs under § 313 (b) equals the DI's share in any net increase or decrease in the aggregate net assets of its unincorporated AFNs.

While § 313 provides the basic definition of net transfer of capital, § 505 contains additional rules essential to the application of § 313, viz:

Transfers involving certain unincorporated AFNs are treated as transfers of capital by the immediate parents or to the immediate parents of such AFNs (§ 505(a) (1), (2), and (3));

A DI is charged with the net change in assets of an unincorporated AFN under § 313(b) only if the immediate parent of such AFN is the DI or another AFN that is a § 903(a) affiliate of the DI (§ 505(a)(4));

A change in net assets of an unincorporated AFN that is not attributable to earnings or losses results in a corresponding § 312 (a) or (b) transfer of capital between the DI and the immediate parent of such AFN, provided the immediate parent is an incorporated AFN and a § 903(a) affiliate (§ 505(a) (5) and (6));

Certain short-term trade credits between non-Canadian AFNs are, in effect, excluded from the calculation of net transfer of capital (§§ 505(b), 1103(c)); and

Transfers between two incorporated AFNs, if either is a § 903(a) affiliate, result in a § 312(b) transfer by the transferor AFN to the DI and a § 312(a) transfer by the DI to the transferee AFN (§ 505(a)(3)).

The rules set forth in § 313 apply to the base period as well as to subsequent years.

§ B313-2 Net transfer of capital to incorporated AFNs.

Under § 313(a), a DI's net transfer of capital to all incorporated AFNs in any scheduled area during any period consists of:

Aggregate transfers of capital during such period by the DI to such AFNs (as described in §§ 312(a) and 505); less

Aggregate transfers of capital during such period by such AFNs to the DI (as described in §§ 312(b) and 505).

The following examples illustrate this concept.

Example 1. During 1969, DI transfers $1 million to an incorporated subsidiary in Schedule A (AFN) as an advance on open account, $500,000 as a contribution to capital, and $400,000 resulting from an increase in accounts receivable due from AFN to DI. In the same year, AFN repays $1,100,000 of a $2 million loan received from DI in 1967. DI has no other incorporated AFNs in Schedule A. DI's net transfer of capital during 1969 to AFN is $800,000, calculated as follows (000 omitted):

Transfers by DI under § 312(a):	
Advance on account to AFN	$1,000
Contribution to capital of AFN	500
Increase in accounts receivable from AFN	400
Total	1,900
Transfers to DI under § 312(b):	
Repayment of loan by AFN	(1,100)
Net transfer (positive)	800

Example 2. At the beginning of 1969, DI has two wholly owned incorporated AFNs in Schedule A (X and Y). In March 1969, DI purchases all the stock of a Brazilian corporation (Z) from an unaffiliated foreign national for $2 million in cash. The following transactions also occur during 1969: DI lends $1 million to X on open account and leases equipment valued at $500,000 to X for a term of 3 years; X redeems (at cost) an issue of preferred stock held by DI for $500,000; Y repays a 1966 loan from DI of $3 million; Y declares a $200,000 dividend to DI, payable on December 15 but not remitted during 1969, and DI repays a $1 million loan owed by Y to a U.S. bank, together with accrued interest and other charges aggregating $100,000. DI's net transfer of capital during 1969 to its incorporated Schedule A AFNs (X, Y, and Z) is $1,300,000, computed as follows (000 omitted):

Transfer by DI under § 312(a):	
Purchase of Z	$2,000
Open account loan to X	1,000
Lease of equipment to X	500
Dividend not paid by Y when due	200
Payment on Y's loan	1,100
Total	4,800
Transfers to DI under § 312(b):	
Redemption by X	(500)
Repayment of loan by Y	(3,000)
Total	(3,500)
Net transfer (positive)	1,300

§ B313-3 Net transfer of capital to unincorporated AFNs.

(i) *General.* Under § 313(b), a net transfer of capital by a DI to all unincorporated AFNs in any scheduled area during any period is defined as the DI's share of the aggregate net increase or decrease during such period in the aggregate net assets of such AFNs. Computation of net assets should take into account all assets (wherever located) and liabilities allocable to the AFN under generally accepted U.S. accounting principles consistently applied, whether such assets and liabilities are recorded in the AFN's legal books of account or in other books of account (including those of the parent AFN).

(ii) *Rules applicable to § 313(b).* In calculating the net change in net assets of an unincorporated AFN the following rules apply:

There should be excluded from liabilities all equity interests in and debt obligations of the unincorporated AFN that are held by the DI and other AFNs of the DI; likewise, there should be excluded from assets all equity interests in and debt obligations of the DI and other AFNs that are held by the unincorporated AFN (§ 313(b) (1) and (2)).

The foregoing rule does not apply with respect to short-term trade credits. That is, if another AFN extends a short-term trade credit to an unincorporated AFN of the same DI, the trade credit should be included as a liability of the unincorporated AFN for the purposes of § 313 (b). The asset received and the liability incurred will net out, and there will be no change resulting therefrom in the AFN's net assets. Note that this is the result prescribed by § 505(b), i.e., short-term trade credits extended or received by an unincorporated AFN (to or from another AFN) should not be taken into account under § 313(b).

On the other hand, if either the AFN extending the credit or the AFN receiving the credit is Canadian, § 505(b) is inapplicable (§ 1103(c)). Thus, if an unincorporated AFN in Schedule C receives a short-term trade credit from a Canadian affiliate of the DI, the liability so incurred will be excluded and the AFN's net assets will include the amount of the credit for purposes of § 313(b).

Any increase or decrease in net assets of an unincorporated AFN resulting from changes in the valuation of such assets during the period involved (such as unrealized gains or losses), should be eliminated from the calculation under § 313(b). However, depreciation of tangible assets should be taken into account to the extent such depreciation is reflected in the calculation of the unincorporated AFN's earnings.

§ B313-4 DI's share of net change in assets under § 313(b).

(i) *Direct ownership.* Where a DI directly owns an unincorporated AFN (e.g., a branch of the DI), the DI's share in the net change in net assets will equal the profits (or losses) of the AFN plus all transfers of capital made by the DI (or other AFNs of the DI) to the AFN, less all remittances made by the AFN to the DI. When the DI does not own all of the unincorporated AFN, transfers between the AFN and its other owners and such other owners' share of the AFN's profits or losses are not included in calculating the DI's share in the net change in the AFN's net assets.

Example 3. DI has two branches in Schedule A (X and Y). Net assets of X and Y at the beginning of 1969 are $200,000 and $300,000, respectively. During 1969, X incurs a loss of $100,000 and DI transfers $50,000 to X on open account; Y earns $90,000, remitting $30,000 to DI; and DI spends $500,000 for construction of a factory in Schedule A, which becomes an unincorporated AFN (branch)(Z) of DI. At the end of 1969, X and Y have net assets of $150,000 and $360,000, respectively. DI's net transfer of

capital during 1969 to its unincorporated Schedule A AFNs is $510,000 ($50,000 net decrease in X's assets plus $60,000 net increase in Y's assets plus $500,000 net increase in Z's assets).

Example 4. In March 1969, DI's unincorporated AFN in Schedule A (Y) invests $50,000 of its own funds in a parcel of local real estate having a fair market value of $100,000 at the end of 1969. Assuming no other relevant transactions, Y's net assets would remain unchanged for purposes of the regulations, since unrealized gains are not taken into account under § 313(b).

Example 5. DI has an unincorporated AFN (B) in Schedule B with net assets of $1 million as of December 31, 1969. During 1970, DI sells B to an unaffiliated foreign national for $1,200,000 cash. DI has made a negative net transfer of capital to Schedule B of $1,200,000 under § 313(b).

Example 6. During 1969, a U.S. corporation (X) enters into a joint venture agreement with an unaffiliated foreign corporation (Y) to operate a factory in Schedule C. Y contributes an existing plant in Schedule C and equipment, valued in the aggregate at $10 million. X contributes patents and technology valued at $5 million (under circumstances exempting the contribution from treatment as a transfer of capital under section 312(c)(11)) and $5 million in cash for working capital. X and Y each has a 50-percent-profit interest in the joint venture. During 1969, a wholly owned subsidiary of X in Australia (B) lends $3 million to the joint venture, repayable at the end of 5 years. Also during 1969, the joint venture realizes $500,000 in gross revenues, spends $300,000 for operating expenses and depreciates its plant and equipment by $200,000. At the end of 1969, the joint venture has $8,200,000 in cash, patents valued at $5 million, plant and equipment valued on its books at $9,800,000, and no liabilities other than the $3 million liability to B. X's net transfer of capital during 1969 to its unincorporated AFN's in Schedule C is $8 million, calculated as follows (000 omitted):

Net assets of joint venture as of Jan. 1, 1969	0
Net assets of joint venture as of Dec. 31, 1969 (the $3,000 loan by B is not included as a liability of the joint venture under § 313 (b)(1)):	
Plant and equipment	$9,800
Patents and technology	5,000
Cash	8,200
Total	23,000
Increase in net assets during 1969	23,000
X's share in net increase:	
Net increase	23,000
Less:	
Plant and equipment contributed by Y	10,000
Patents and technology	5,000
Net transfer of capital by X	8,000

Note that the loan by B to the joint venture involves a transfer of capital by B to X under § 505(a) (1) and (2).

Example 7. DI is a partner in a partnership organized under German law and doing business only in Germany. DI has a 50-percent share in the partnership profits. The other partners (X and Y), each of whom has a 25-percent interest, are residents and citizens of Germany. At the beginning of 1969, the partnership has net assets of $1 million. During 1969 the partnership earns $100,000 and distributes $20,000 to DI and $10,000 to each of X and Y. Also during 1969, DI lends $200,000 to the partnership on open account. At the end of 1969, the partnership has net assets of $1,260,000 (excluding liabilities to DI). DI's net transfer of capital during 1969 to its unincorporated Schedule C AFN is $230,000 (i.e., DI's $50,000 share of profits plus the $200,000 loan, less the $20,00 remitted to DI).

Had the partnership incurred a loss of $50,000 and made no distributions to the partners, the net assets at the end of 1969 would be $1,150,000 (excluding liabilities to DI), and DI's net transfer of capital during 1969 to its unincorporated Schedule C AFN would be $175,000 (i.e., the $200,000 loan less DI's $25,000 share of the loss).

(ii) *Indirect ownership.* A DI's net transfer of capital to all unincorporated AFNs in a scheduled area includes the DI's share of the net changes in the net assets of unincorporated AFNs in the scheduled area which are owned by other AFNs of the DI located in other scheduled areas, so long as such other AFNs are "affiliates" of the DI, as described in § 903(a) of the regulations. (See § 505 (a)(4).) The calculation of any such net change should be made as if the DI itself were the immediate parent of the unincorporated AFN; the DI's share of the net change is a percentage thereof equal to the DI's percentage interest in the immediate parent.

The following examples are illustrative:

Example 8. DI has a 60-percent-owned incorporated AFN (A) in Schedule A, which has a 50-percent profits interest in a joint venture (B) in Schedule B. The other 50-percent interest in B is owned by an unaffiliated foreign national (X). During 1970, A makes a $1 million loan to B, and as a result B's net assets increase by $1 million. A's share of the increase is $1 million (see Example 7 above); and DI's share is $600,000 (i.e. 60% of A's share). DI has made a § 313 (b) net transfer of capital of $600,000 to Schedule B for 1970. By operation of § 505 (a)(6), A is deemed to have made a $600,000 transfer of capital to DI.

In 1971 B has earnings of $1 million, makes no remittances and has an increase in its assets of $1 million. A's share of such increase is $500,000, and DI's share is $300,000 (60% of A's share). DI has made a § 313(b) net transfer of capital of $300,000 to Schedule B for 1971.

Example 9. DI has a wholly owned subsidiary in Germany (C) that has a branch in Brazil (A). At the beginning of 1969, A's balance sheet is as follows (000 omitted):

Assets	
Cash	$75
Customer receivables	140
Inventory	360
Fixed assets (net)	400
Total	975
Liabilities and net assets	
Trade payables (liabilities)	$210
Home office (net assets)	765
Total	975

During 1969, A earns $25,000 and DI and C each make cash advances to A of $75,000. On August 1, 1969, a wholly owned subsidiary of DI in Australia (B) sells $50,000 of inventory to A on 6-month credit terms. At the end of 1969, A's balance sheet is as follows (000 omitted):

Assets	
Cash	$340
Customer receivables	175
Inventory	410
Fixed assets (net)	325
Total	1,250
Liabilities and net assets	
Trade payables [1]	$310
Home office account (net assets) [2]	940
Total	1,250

[1] Including the payable of $50 [thousand] owed to B. If the credit terms extended by B had been for more than 12 months, the amount due would be included under the home office account rather than in "trade payables." DI's net transfer to A would, therefore, be increased by $50 [thousand] and result in a $50 [thousand] negative net transfer of capital to Schedule B (see § 505 (b) and 505(a)(2)).

[2] Including payable of $75 [thousand] owed to DI.

DI's net transfer of capital during 1969 to Schedule A unincorporated AFNs is $175,000 (i.e., the increase in home office account (net assets) from $765,000 to $940,000 during 1969). However, DI will have a $75,000 negative net transfer of capital to Schedule C (i.e., the $75,000 deemed transferred by DI to C by operation of § 505 (a)(1) and (a)(2), less the $150,000 deemed transferred by C to DI by operation of § 505(a)(6)).

If DI owned only 80 percent of C's voting stock, DI's net transfer of capital during 1969 to Schedule A unincorporated AFNs would be $140,000 (i.e., $175,000 × 80 percent). However, DI would have a $45,000 negative net transfer of capital to Schedule C (the $75,000 deemed transferred by DI to C by operation of § 505 (a)(1) and (a)(2), less the $120,000 deemed transferred by C to DI by operation of § 505(a)(6)).

If DI were to own only 50 percent of C's voting stock, DI's net transfer of capital during 1969 to Schedule A unincorporated AFNs would be zero (see § 505(a)(4)). In this event, however, DI will have a $75,000 positive net transfer of capital to Schedule C, deemed transferred by DI to C by operations of § 505 (a)(1) and (a)(2).

§ B313–5 Special treatment of certain § 312 transfers in computing net transfer of capital to unincorporated AFNs.

A transaction involving an unincorporated AFN that constitutes a transfer of capital under § 312 must be reflected in computing net transfer of capital to unincorporated AFNs under § 313(b) even though it would not necessarily enter into the calculation of net assets in accordance with ordinary accounting principles.

(i) *Repayment of long-term foreign borrowing.* Section 312(a)(7) provides that when a DI satisfies, in whole or in part, a long-term foreign borrowing (whenever made) and the proceeds of such borrowing were either expended in making transfers of capital on or after January 1, 1965, or were allocated to positive direct investment, such repayment constitutes a transfer of capital to the scheduled area or areas in which the proceeds were expended or allocated at the time of repayment and with respect to which a deduction (against net transfer of capital or positive direct investment, as the case may be) was taken

pursuant to § 203(d), § 306(e), or § 313 (d)(1).

Example 10. In January 1968, DI makes a long-term foreign borrowing of $5 million from a London bank, the proceeds of which are used to construct a factory in Chile (Schedule A) resulting in a net increase in net assets of DI's Schedule A AFN in 1968 of $5 million (from $0 to $5 million). DI deducts this expenditure from 1968 net transfer of capital to Schedule A, pursuant to § 313(d) (1). In 1969, the AFN has earnings of $450,000, and transfers $200,000 to DI. The net increase in net assets is, therefore, $250,000. On December 1, 1969, DI repays $1 million to the London bank. Accordingly, DI's net transfer of capital to Schedule A in 1969 is $1,250,000 ($250,000 net increase in the Chilean factory's net assets, plus repayment of $1 million that had previously been expended in, and deducted from, net transfer of capital to Schedule A).

(ii) *Transfers under § 312(a)(9).* If DI makes a pledge, hypothecation or other transfer of foreign balances or equity securities of a foreign corporation to a foreign national to induce a loan by such foreign national to an AFN or a long-term foreign borrowing which DI invests in an AFN, such transfer of foreign balances constitutes a transfer of capital to the AFN under § 312(a)(9).

Example 11. DI has a 50 percent profits interest in a joint venture (B) located in Schedule B. During 1970 DI deposits $1 million cash with a foreign bank as inducement for a loan of $800,000 by the bank to B. Although the loan would not result in an increase in B's net assets under § 313(b), DI must recognize a transfer of capital of $800,000 to B under § 312(a)(9) during 1970. Similarly, it will report a transfer of capital under § 312(b) from B in the same amount when the deposit is withdrawn even though B's net assets may not decrease.

(iii) *Offshore drilling rigs.* When a vessel directly owned by a person within the United States is used as part of an offshore drilling operation (i.e., a branch of a DI), it is assigned a value of zero for purposes of computing any net change in net branch assets.

Example 12. In January 1969, DI began drilling operations off the coast of Australia. This venture constitutes an unincorporated Schedule B AFN. In February 1969, DI sends its U.S.-flag barge to the worksite, and the barge is used during 1969 in drilling operations. Although transfer of the barge constitutes a transfer of capital to the AFN under § 312(a), the barge is assigned a value of zero for purposes of computing the net assets of the AFN. The same rule would also apply to other U.S.-flag vessels used in support of the offshore drilling operations (such as supply or crew vessels). Note that since such vessels are deemed to have a value of zero, no deductions for depreciation of such vessels may be taken.

§ B313–6 Deduction for expended proceeds of long-term foreign borrowing.

In calculating a DI's net transfer of capital to a scheduled area during any period (including the base period years of 1965 and 1966), the DI should deduct an amount equal to the proceeds of long-term foreign borrowing (defined in § 324 (c)) expended during such period in making transfers of capital to AFNs in the scheduled area (§ 313(d)(1)).

To be deductible under § 313(d)(1), the borrowing must qualify as long-term foreign borrowing of the DI under § 324 (borrowings by AFNs will not qualify for the deduction).

Under § 324(c), the gross amount of proceeds borrowed is deductible in calculating net transfers of capital. In effect, therefore, DI is treated as having paid the interest and other charges on the borrowing out of its own funds (such payment not involving a transfer of capital).

Example 13. In September, 1970, DI acquires all the stock of a corporation in Argentina from an unaffiliated foreign national (Y). The purchase price is $1 million, $500,000 payable in cash at closing and the balance payable in equal annual installments of $100,000 thereafter. Each installment is represented by a promissory note of DI, with respect to which Y makes the necessary written representations referred to in § 324 (a)(1)(iv). DI has made a $500,000 "foreign borrowing" within the meaning of § 324 (a)(1). Assuming the borrowing will qualify as long-term foreign borrowing under § 324 (a)(2), the proceeds thereof are to be deducted from DI's net transfer of capital under § 313(d)(1). DI's net transfer of capital to Schedule A during 1970 is, therefore, $500,000 (i.e., the $1 million purchase price, minus $500,000 proceeds of long-term foreign borrowing). Each principal payment by DI on the outstanding notes will constitute a transfer of capital to the AFN under § 312(a)(7), and must be so reflected in calculating DI's net transfer of capital to Schedule A in 1971 and in each subsequent year of payment.

For a more detailed treatment of § 313 (d)(1) see § B324–8.

§ B313–7 Step acquisitions.

In calculating a DI's net transfer of capital to all AFNs in a scheduled area during any period (including the base period years of 1965 and 1966), the DI should include (a) all transfers of funds or other property as a result of which the DI acquires an AFN and (b) all transfers of funds or other property to, on behalf of, or for the benefit of such AFN made by, on behalf of, or for the benefit of such DI within 12 months prior to the date of the transfer by which it became a DI in such AFN.

Example 14. On November 1, 1969, a U.S. corporation (X) having no AFNs acquires 8 percent of the voting stock of a French corporation (C) from an unaffiliated foreign national for $1 million in cash. On December 1, 1969, X lends C $500,000. On March 1, 1970, X acquires an additional 2 percent of C's voting stock from a second unaffiliated foreign national for $250,000 in cash. X's net transfer of capital during 1969 to Schedule C is zero. X's net transfer of capital during 1970 to Schedule C is $1,750,000.

If the initial purchase of X's voting stock had been made on February 1, 1969, there would still be no net transfer of capital in 1969, and X's net transfer of capital during 1970 to Schedule C would be $750,000 (i.e., the $250,000 transfer of capital that gave rise to the DI–AFN relationship plus the $500,000 lent to C within 12 months prior thereto).

Example 15. On January 1, 1969, a U.S. corporation (X), having no AFNs, enters into a construction contract with an unaffiliated foreign national (Y) whereby X is to construct a factory for Y in a Schedule C country. On March 1 a project office is opened and preliminary survey work on the project is commenced. On April 1, 1969, X sends equipment, machinery and supplies valued at $1 million to the project site. At the time the project office was opened, X reasonably expected that the work would be completed by the end of February 1970. Thus, the project is not an AFN of X (see § 304(d)(ii)). At the end of 1969, net assets of the project are $1 million, but there has been no net transfer of capital to Schedule C during 1969 since the project is not an AFN. Significant difficulties of an unexpected nature are encountered, and during 1970, X sends additional equipment, machinery and supplies valued at $1 million to the project site. At the end of 1970, the net assets employed in the project amount to $2 million. Work on the project is not in fact completed until March 1, 1971. Accordingly, since work on the project was not in fact completed within 12 months from the date it commenced, the project is an AFN of X commencing January 1, 1970, and, because of the provisions of § 313(d)(2), X has made a positive net transfer of capital of $2 million to Schedule C during 1970.

B319—Schedule A, B, and C Countries

Section 319 assigns each of the countries of the world to one of three scheduled areas, A, B, and C. Direct investment made by a DI is generally calculated on the basis of a scheduled area, reflecting aggregate transactions involving all AFNs in such schedule.

The countries in Schedule A include those designated as less-developed countries for purposes of the Interest Equalization Tax. The countries in Schedule B include certain designated countries such as Australia, Ireland, Japan, New Zealand, the United Kingdom, certain Middle East oil-producing countries and, commencing in 1970, Spain. The countries in Schedule C include those not included in Schedule A or B, such as South Africa and the countries of continental Europe other than Finland, Greece, Turkey, and Yugoslavia and, commencing in 1970, Spain.

Section 319(b) was amended in 1970 to reclassify Spain from Schedule C to Schedule B as of January 1, 1970. Consequently, for 1970 and succeeding years DIs should include all direct investment in Spanish AFNs in calculating direct investment in Schedule B and should exclude such direct investment from the Schedule C computation. No change will be made in the base period figures used to calculate § 504(a) historical allowables or in any direct investment reported for 1968 and 1969. Furthermore, a DI's 1970 § 504(b) earnings allowable in Schedules B and C (based on 1969 earnings reported on the 1969 Annual Report Form FDI–102F) will not be changed. It is not necessary or permitted for any DI to amend or refile its Form FDI–101 or Forms FDI–102 and FDI–102F for 1968 or 1969 as a result of the reclassification of Spain. However, 1970 earnings of Spanish AFN's will be included with other Schedule B earnings for purposes of determining a DI's 1971 § 504(b) earnings allowable and 1971 § 504(c)(3) upstream adjustment for Schedule B. The computation of the § 506 incremental earnings allowable,

being based on aggregate worldwide figures, will not be affected as a result of this change. Although the Schedule B historical and earnings allowables in effect for 1970 will not be increased as a result of this change in the scheduled area to which Spain is assigned, DIs may downstream unused Schedule C allowables to Schedule B to cover any increased investment in Schedule B in 1970 and succeeding years.

Example 1. DI has one AFN, which is located in Spain, and § 504(a) allowables of $1,200,000 in Schedule C and zero in Schedules B and A. In 1970 DI elects § 504(a) and makes positive direct investment of $1 million in its Spanish AFN. DI should report positive direct investment in 1970 of $1 million in Schedule B and zero in Schedule C. The Schedule B investment is authorized by DI's Schedule C allowable, under the carrydown provisions of § 504(d)(3). DI will have $200,000 of carryforward under § 504(d)(3) which will authorize additional positive direct investment in Schedules C, B, or A in 1971 and succeeding years.

Example 2. DI has one AFN, which is located in Spain. The AFN's 1969 earnings are $4 million. DI's § 504(a) historical allowables are $800,000 in Schedule C and zero in Schedules B and A. In 1970, DI elects the § 504(b) earnings allowable and makes positive direct investment of $1,200,000 in its Spanish AFN, which is correctly reported in Schedule B. This positive direct investment is authorized by DI's Schedule C earnings allowable of $1,200,000 which is available in Schedule B under § 504(d)(3).

Example 3. DI has one AFN which is located in Spain. At the end of 1969, the AFN owed DI $1 million on open account. In March 1970, the AFN pays DI $1 million in satisfaction of the open account balance. In October 1970 AFN is billed $1,500,000 for a shipment of goods, so that the open account balance at the end of 1970 is $1,500,000. In 1970, DI has made a net transfer of capital to Schedule B of $500,000.

If a DI expended proceeds of long-term foreign borrowing in making transfers of capital to Spanish AFNs prior to 1970 and took a deduction from net transfer of capital to Schedule C under § 313(d)(1), repayment of such borrowing on or after January 1, 1970, will constitute a transfer of capital to Schedule C (not Schedule B) under § 312(a)(7).

B321—Calendar Year and Fiscal Year

The term "year", as used in the regulations, is defined in § 321(a) to mean a calendar year except for DIs securing permission under § 321(b) to measure compliance on the basis of their normal fiscal year. Although, in appropriate cases, a fiscal year DI may be permitted to comply with the substantive provisions of the regulations on such basis (§ 321(b)), all DIs (including all fiscal year DIs) are required to submit cumulative quarterly reports (Form FDI-102) and the annual report (Form FDI-102F) on a calendar basis. DIs receiving permission to measure compliance on a fiscal year basis must file an additional annual compliance report covering operations for such fiscal year.

DIs may request permission to comply with the regulations on a fiscal year basis by applying for a specific exemption under § 801. The applicant must demonstrate that by reason of the nature of its business, accurate reflection of total annual operations for purposes of the regulations can only be on the basis of its fiscal year. DIs maintaining normal books and records on a calendar year basis are not eligible for relief under § 321(b) merely because one or more AFNs operate on a fiscal year basis. DIs should refer to the general instructions to Forms FDI-102 and 102F with respect to reporting earnings of AFNs that operate on the basis of a fiscal year different from the DI's.

B322—Person Within the United States

§ B322-1 Introduction.

The regulations apply only to DIs, and a person is not a DI unless he (or it) is a "person within the United States," as defined in § 322. (The term "United States" is defined in § 318.)

§ B322-2 Individuals.

(i) *Residence.* Section 322(a)(1) provides that a resident of the United States is a person within the United States. This rule applies without regard to citizenship.

The determination whether a person is a "resident" of the United States depends on the facts and circumstances of each particular case. In general, a permanent place of abode within the United States or physical presence in the United States for more than 183 days during the year will be conclusive. However, aliens will not be considered residents of the United States if they have no intention to remain in the United States permanently or for an indefinite period. Thus, for example, an alien present in the United States as a student, an entertainer on tour, an athlete competing in one or more athletic contests, a patient undergoing medical treatment, or a traveler will not be treated as a resident of the United States. Residence in the United States will be treated as continuous notwithstanding occasional trips out of the country during such residence.

(ii) *Center of economic interest.* Section 322(a)(2) provides that a citizen of the United States residing abroad is nevertheless a person within the United States, if the center of his economic interests is located within the United States. Whether a U.S. citizen's center of economic interests is located within the United States depends on the particular facts and circumstances of each case. Among the factors that will be considered are the length of time residence has been outside the United States, the person's intention concerning future residence, the relative values of investments in the United States and in foreign countries, and the nature of the U.S. investments (i.e., whether passive portfolio investments or active participation in business is involved).

Example 1. A U.S. citizen (X) becomes a resident of a foreign country in February 1968. X owns all the stock of a U.S. corporation (Y). After X becomes a nonresident of the United States, he nevertheless continues actively to participate in Y's business and makes frequent trips to the United States for this purpose. X's only other investments are of a portfolio and short-term debt nature. X is a person within the United States.

Example 2. A U.S. citizen (X) owns a retail merchandising business in the United States. Upon reaching age 65, X sells his business to an unrelated person within the United States and purchases an annuity from a U.S. insurance company. In January 1968, X sells his home in the United States and he and his wife move to Iceland, X's ancestral homeland, where he establishes a permanent residence. X's grown children continue to live in the United States. X continues to maintain bank accounts in the United States, into which periodic payments from the proceeds of his annuity are made. X also continues to own a small parcel of undeveloped real estate in the United States, purchased many years ago for investment. X is not a person within the United States.

Example 3. A U.S. citizen (W), resident in a foreign country for many years, owns 75 percent of the stock of X and Y, both U.S. corporations. Y owns 75 percent of Z, a third U.S. corporation. X owns all the share capital of 6 foreign corporations and has 12 branch operations in foreign countries, and Y owns all the share capital of six different foreign corporations and has 10 branch operations in foreign countries. X, Y, and Z all have substantial manufacturing or selling operations in the United States. The products of X, Y, and Z are sold both in the United States and in foreign countries. Total sales of X, Y, and Z and their 12 foreign affiliated corporations and 22 foreign branches amount to several million dollars annually. All major policy decisions of X, Y, and Z and their affiliated foreign nationals are made by W, who maintains no fixed office abroad.

Decisions on particular matters within the policy guidelines laid down by W are made at the head offices of the three U.S. corporations and are relayed to all domestic and foreign operations from such head offices, subject only to the periodic review of W. W conducts no significant separate foreign business activities aside from those conducted through his direction of the affairs of X, Y, and Z corporations. W is a person within the United States.

Example 4. A U.S. citizen (X) owns all the stock of Y, a U.S. corporation with extensive, worldwide foreign operations. In 1965, X establishes his permanent residence in Belgium, and C, a foreign corporation, in Belgium. In September 1966, C purchases all the stock of Y from X, in exchange for additional shares in C. In a series of corporate reorganizations carried out in 1966 and 1967, the foreign operations formerly conducted by Y and the foreign corporations previously owned by Y become foreign operations and corporations conducted and owned, respectively, by C. Direction of all such operations is carried on in Belgium; the head offices and senior managerial staff are moved to Belgium; and by December 1967, Y has no foreign holdings of its own. X is not a person within the United States in 1968.

Example 5. A U.S. citizen (X), having permanently resided in Italy since 1961, owns several parcels of undeveloped and commercial real estate in the United States with an aggregate fair market value in excess of $10 million in January 1968. The commercial real estate is managed for X by an independent real estate organization, and profits are remitted to X periodically. X maintains certain bank accounts in the United States in connection with his real estate investments. His only other U.S. investments consist of marketable securities of large U.S. corporations. X makes one or two trips per year to the United States, primarily to visit relatives. X has no significant investments in foreign countries. X is not a person within the United States.

§ B322–3 **Corporations or partnerships.**

Section 322(a)(3) provides that a corporation or partnership organized under tne laws of the United States (excluding a branch of such corporation or partnership, if the branch is a separate foreign national under § 302) is a person within the United States.

§ B322–4 **Trusts.**

Trusts (other than a trust deemed to be a corporation under § 307(b)) deemed to be persons within the United States, under § 322(a)(4), include inter vivos or testamentary trusts established by persons within the United States in which a person or persons within the United States have substantial beneficial interest.

An inter vivos trust governed by the laws of the United States to which any property is or has been contributed by a person who, at the time of making the contribution, is or was a person within the United States would be governed by § 322(a)(4), if: (a) Such contribution is or was made on or after January 1, 1968; or (b) the terms of the trust are such that the income therefrom is currently taxable to such persons for U.S. Federal Income Tax purposes; or (c) a majority of the trustees thereof are or were, at any time after January 1, 1968, persons within the United States and OFDI has not been furnished with satisfactory evidence that no person or persons within the United States have a substantial beneficial interest in the trust.

A testamentary trust governed by the laws of the United States and created by a person who, at the time of his death, was a person within the United States, would likewise be governed by § 322(a)(4), if a majority of the trustees thereof are or were, at any time after January 1, 1968, persons within the United States and OFDI has not been furnished satisfactory evidence that no person or persons within the United States have a substantial beneficial interest in the trust.

§ B322–5 **Estates.**

A decedent's estate is deemed to be a person within the United States under § 322(a)(5), if the deceased was a person within the United States at the time of his death, and: (a) A majority of the executors or administrators are persons within the United States, or substantial assets of the estate are being administered under the laws of the United States; and (b) OFDI has not been furnished satisfactory evidence that no person or persons within the United States have a substantial beneficial interest in the estate.

§ B322–6 **Domestic banks.**

Section 322(a)(6) makes clear that a domestic bank (including a domestic branch or office of a foreign bank), as defined in § 317(a), will be considered a person within the United States.

§ B322–7 **Special cases.**

Under § 322(b), OFDI may determine, in particular cases based on the facts and circumstances involved, that a person not described in § 322(a), or an activity (such as a branch) of a person not described in § 322(a), is nevertheless a person within the United States for purposes of the regulations.

Example 6. Corporation Y, a foreign corporation, has no managerial office or operations in the country of incorporation. Ninety-five percent of Y's share capital is held by persons within the United States and shares are traded on a national securities exchange in the United States. The principal office of Y is in the United States and all officers and directors are citizens and residents of the United States. Y owns more than 10 percent of the share capital (in proportions ranging from 15 percent to 100 percent) of more than 20 foreign corporations. Under the foregoing facts, Y could be deemed a person within the United States for purposes of the regulations.

B323—International Finance Subsidiaries

Section 323 defines the term "international finance subsidiary" ("IFS") to mean a corporation organized under the laws of the United States, all the stock of which (disregarding directors' qualifying shares) is owned directly or indirectly by a DI, and the principal business of which is to borrow funds from foreign nationals, other than AFNs of the DI, and to invest such funds in debt or equity securities of AFNs of the DI. The section further provides that a DI and its IFS are considered a single person for all purposes of the regulations.

Accordingly, direct investment transactions of, and foreign balances held by, an IFS are attributed to the DI, and transactions between the DI and the IFS are ignored for purposes of the regulations. Similarly, long-term foreign borrowings obtained by the IFS are considered borrowings by the DI, and only one certificate need be filed by the DI under § 1002 (a)(6) and (b) concerning each such borrowing. Therefore, if the DI guarantees due and punctual payment of the principal, premium (if any), and interest on debt obligations of the IFS, together with due and punctual mandatory sinking fund payments (if any), the DI should file the "Subpart J" certificate as a borrower, not a guarantor, and any payments made by DI under the guarantee (including delivery of capital stock of DI pursuant to exercise of conversion privileges) will be treated as repayments by a borrower and not by a guarantor.

In light of the foregoing, records maintained pursuant to §§ 203(c) and 601, and reports filed under § 602, by the DI should include all relevant items attributable to the IFS.

B324—Long-Term Foreign Borrowing

§ B324–1 **Introduction.**

Section 324 sets forth the rules governing the qualification of borrowing by a DI as long-term foreign borrowing and the amount of proceeds of long-term foreign borrowing that may be used as an offset in calculating direct investment. In addition, § 324 deals with the effect of refinancing and repayment of borrowings. Related provisions of the regulations concerning the use of proceeds and the repayment of long-term foreign borrowing are also discussed in this section of the Bulletin.

DI may offset direct investment either through a deduction from net transfer of capital under § 313(d)(1) for expenditure of proceeds of long-term foreign borrowing or through a deduction from positive direct investment by allocating such proceeds under § 306(e). Only proceeds of a borrowing that qualifies under § 324 as long-term foreign borrowing may be used as an offset to direct investment.

Section B324–4 contains a detailed description as to how borrowing qualifies as long-term foreign borrowing. The requirements for qualification depend upon when the borrowing was made.

The gross amount of funds or other property received from long-term foreign borrowing constitutes "proceeds of long-term foreign borrowing" until the underlying borrowing is repaid. Proceeds are "available proceeds" until expended in making transfers of capital to AFNs or allocated to positive direct investment. Only available proceeds of long-term foreign borrowing are deducted from net transfer of capital under § 313(d)(1) or from positive direct investment under § 306(e). After deduction for expenditure or allocation, the amount of the borrowing outstanding still constitutes proceeds of long-term foreign borrowing but ceases to be available proceeds. As provided in § 203(d) (2) and (3), a DI may change the scheduled area to which the offset applies. (See § B324–10.) For example, if a DI expended and deducted (under § 313(d)(1)) available proceeds of long-term foreign borrowing in Schedule A, those proceeds could subsequently be allocated to and deducted from positive direct investment in Schedule B (under § 203(d)(2)). Upon such allocation to Schedule B, however, DI must recognize a transfer of capital to Schedule A, where the previous deduction was taken. Section 203(d)(2) also permits further allocations of the proceeds while the borrowing is outstanding, with the same effects. Proceeds originally expended and subsequently allocated to a different scheduled area under § 203(d)(2) may remain expended in an AFN or may be expended in another AFN, but no deduction under § 313(d)(1) may be taken for such expenditure.

Repayment (in whole or in part) of a long-term foreign borrowing for which a direct investment offset was taken is recognized as a transfer of capital (§ 312(a)(7)) in the last scheduled area in which a deduction was taken, whether under § 306(e), § 313(d)(1), § 203(d)(2), or § 203(d)(3). If deductions were last taken in more than one scheduled area, the charge is made on a proportional basis among the scheduled areas.

The regulations require a DI to keep separate books and records with respect to long-term foreign borrowings and the uses to which the proceeds of such borrowings have been put. Such records must distinguish between deductions taken by reason of the borrowing and the actual flow of funds. (See § 203(b).)

§ B324–2 Related sections.

The following sections of the regulations relate to long-term foreign borrowing:

(i) *Section 1002.* Even though a transfer of capital is recognized upon repayment of a long-term foreign borrowing the proceeds of which were expended or allocated, positive direct investment resulting from such repayment may be authorized by § 1002 (subject to the provisions of § 1003) if DI has satisfied applicable certification requirements.

(ii) *Section 203*(c). A DI is permitted to hold available proceeds of long-term foreign borrowing in the form of liquid foreign balances without limitation in amount.

(iii) *Section 203(d)(1)*. A positive net transfer of capital (subject to certain exemptions) to any scheduled area is prohibited during any year if a DI holds available proceeds of long-term foreign borrowing in the form of foreign property at the end of such year.

(iv) *Subpart N.* Proceeds of an overseas borrowing that are loaned by a qualified overseas finance subsidiary to the DI in proceeds borrowing are deemed available proceeds of long-term foreign borrowing as defined in § 324(d). (See § B1403–1.)

§ B324–3 Summary of § 324.

Section 324 has been amended with respect to borrowings made on or after May 1, 1970. These amendments were published in final form in the FEDERAL REGISTER on June 13, 1970 (35 F.R. 9248). The following summary compares the structure of § 324 before and after the 1970 amendments.

Prior to amendment the provisions of § 324 were as follows:

(a) Definition of long-term foreign borrowing applicable to (i) borrowings made prior to January 1, 1968, and (ii) borrowings made on or after January 1, 1968.

(b) (1) Effect of refinancing.

(b) (2) Effect of conversion of convertible debt instruments.

(c) Definition of proceeds.

(d) Definition of available proceeds.

(e) Requirements in addition to those of § 324(a) applicable to borrowings made on or after June 10, 1968.

The provisions of § 324 as amended are as follows:

(a) (1) Definition of foreign borrowing (incorporating the conditions of former § 324(e)).

(a) (2) Definition of long-term foreign borrowing applicable to borrowings made on or after May 1, 1970.

(a) (3) Definition of long-term foreign borrowing applicable to borrowings made prior to May 1, 1970 (by reference to former § 324).

(b) (1) Definition of refinancing (amended to conform to new § 324(a)).

(b) (2) [Unchanged]

(c) [Unchanged]

(d) [Unchanged]

(e) [Revoked]

§ B324–4 Definition of long-term foreign borrowing.

To qualify as long-term foreign borrowing under § 324 a borrowing must be made by a DI from a foreign national, other than an AFN or a Canadian person as described in § 1106. See former § 324(a) and new § 324(a)(1).

The term "borrowing" as used in § 324 refers not only to the typical loan of funds to or sale of debt obligations by a DI, but also to other transactions resulting in acquisition of an equity interest in consideration for a fixed sum or sums (regardless of the medium of payment) for which payment is completely or partially deferred. For example, an installment purchase (including a long-term lease or charter that is treated, consistent with accounting principles generally accepted in the United States, as an installment purchase) would be a borrowing that might qualify as long-term foreign borrowing under § 324. See Examples 1, 2, and 3 below.

The term "borrowing" involves only issuance of debt obligations, not equity securities, by a DI. See Examples 2 and 6 below. An international finance subsidiary of a DI (see § 323) is considered the same entity as the DI. If such subsidiary issues debentures convertible into stock of the DI, the debentures will be considered debt obligations of the DI; however, if the debentures have detachable warrants entitling the holder to purchase DI's stock, the issue will be considered to be part debt and part equity. (For discussion of the computation of proceeds of long-term foreign borrowing when debentures are issued with warrants attached, see Examples 5 and 24 below.)

For purposes of determining whether a borrowing is from a foreign national, the lender will be considered to be the person extending the credit. With respect to issuance of debt obligations, the first public purchasers are generally considered the lenders. Accordingly, sales of debt obligations to underwriters or dealers, United States or foreign, in a public offering are irrelevant in determining whether the debt obligations are sold to foreign nationals. Similarly, if a foreign national does not act for its own account, but as agent or fiduciary for the account of another person, the nationality and residence of the person actually extending credit will determine whether the borrowing is from a foreign national. See Example 7 below.

Example 1. DI purchases all the voting stock of a French corporation from an unaffiliated foreign national. The purchase price is $1 million, $250,000 of which was paid in cash at the closing, the balance being payable (together with interest) in three equal annual installments commencing 1 year from the date of closing. DI has made a transfer of capital of $1 million and a borrowing from a foreign national of $750,000, which will qualify as long-term foreign borrowing if it meets the applicable requirements of § 324. See § B324–4 (i)–(iv).

Example 2. DI acquires all the voting equity of a French corporation from foreign shareholders, in exchange for 20,000 shares of DI's common stock at the closing, 10,000 shares of such stock 3 years after the closing, and an indeterminate number of shares (based on future earnings of the French corporation) 5 years after the closing. DI has not made a borrowing with respect to the obligation to deliver common stock 3 years and 5 years hence. (The value of the transfer of capital will depend on all the facts and circumstances of the acquisition.) If, however, DI had agreed to deliver $10 million worth of its capital stock 3 years after closing (the actual number of shares to be delivered will depend on their market value at the time), DI would be deemed to have made a borrowing of $10 million. The obligation would be for a fixed sum, and the medium of payment may be other than cash.

Example 3. DI enters into a 10-year equipment lease with an unaffiliated foreign national (X). The equipment lease with X is appropriately treated as an installment purchase by DI under accounting principles generally accepted in the United States. An appropriate portion of the aggregate rentals should be treated as borrowing from a foreign national by DI, the remainder being allocated to interest charges.

Example 4. An international finance subsidiary of DI sells abroad $20 million face amount of debentures at par. The debentures have a 12-year maturity and are convertible into common stock of DI after 6 months from date of issue. DI has made a borrowing from a foreign national of $20 million, which will qualify as long-term foreign borrowing if it meets the applicable requirements of § 324. See § B324–4 (i)–(iv).

Example 5. An international finance subsidiary of DI sells abroad $20 million face amount of debentures at par. The debentures have a 12-year term and have no required sinking fund payments. Each $1,000 debenture is sold with a warrant attached for five shares of common stock of DI. The warrants are detachable after 6 months, and are exercisable after 12 months from the issue date. DI has made a borrowing from a foreign national of $20 million, less an amount reasonably allocable to the value of the warrants.

Example 6. DI sells abroad 500,000 shares of preferred stock for $50 per share. DI has not made a borrowing for purposes of § 324.

Example 7. DI desires to borrow $1 million from a Swiss bank. The bank states that it would not itself lend the funds, but that it can place the loan with a U.S. resident and national who has an account at the Swiss bank. The loan, if consummated, would not constitute a borrowing from a foreign national within the meaning of § 324(a).

The additional requirements for a borrowing by a DI from a foreign national to qualify as long-term foreign borrowing depend upon whether the borrowing was made (i) prior to January 1, 1968 (the effective date of the Program); (ii) from January 1 through June 9, 1968; (iii) from June 10, 1968 through April 30, 1970; or (iv) on or after May 1, 1970.

(i) *Borrowings made prior to January 1, 1968.* A borrowing made prior to January 1, 1968, was a long-term foreign borrowing if such borrowing had an original maturity of at least 12 months from the original date of such borrowing, or if no principal payments were, in fact, made within 12 months from the date of the borrowing.

(ii) *Borrowings made on or after January 1, 1968, and prior to June 10, 1968.* A borrowing made on or after January 1 and prior to June 10, 1968, was a long-term foreign borrowing if such borrowing had an original maturity of at least 12 months from the original date of such borrowing. The same requirements apply to borrowings made on or after June 10, 1968, and prior to May 1, 1970, except that an additional requirement was imposed by former § 324(e) during that period. See § B324–4(iii).

The "original maturity" of a borrowing referred to the date the first principal payment was required. Provisions for acceleration upon default or conversion privileges in convertible debt instruments were disregarded in determining whether a borrowing had an original maturity of 12 months. A borrowing made on or after January 1, 1968, but prior to May 1, 1970, was treated as having an original maturity of at least 12 months if there were express provisions for renewal, extension, or continuance of the debt for a total term of at least 12 months and the DI reasonably expected that no principal payment would be made within 12 months after the date of the borrowing.

The date of a borrowing refers to the date the proceeds are received by the DI. Opening of a line of credit, such as a revolving credit agreement or an overdraft facility, is not itself a borrowing; borrowing under a line of credit occurs on the date of takedown, in the amount of funds so received. On the other hand, a borrowing involving the public offering of debt obligations is deemed to have been made on the date the obligations are issued. See § 1002(e)(1).

Example 8. On July 1, 1969, DI entered into a 5-year agreement with a German bank under which the bank agreed to loan DI up to $10 million, with the loan or loans to be evidenced by 12-month notes. As of that date, DI had not made a long-term foreign borrowing. On September 1, 1969, DI made a takedown of $5 million, evidenced by ten 12-month notes for $500,000 each. Thus, on September 1, 1969, DI made a long-term foreign borrowing of $5 million.

(iii) *Borrowings made on or after June 10, 1968: § 324(a)(1) and former § 324(e).* As a result of former § 324(e), borrowings made from June 10, 1968, through April 30, 1970, could not qualify as long-term foreign borrowing unless:

The borrowing was from a foreign bank; or

The borrowing was from or was guaranteed by a foreign country or any agency thereof; or

The borrowing had an original maturity of at least 3 years, and (as of the date of the borrowing) acquisition of the debt obligation would have been subject to the U.S. Interest Equalization Tax; or

The lender agreed in writing that, for a period of 3 years from the date of the borrowing or until final maturity, whichever would first occur, it would not sell or otherwise transfer the debt obligation resulting from the borrowing (a) to a resident or national of the United States (other than a foreign bank as defined in § 317) or to a Canadian person (as defined in § 1101), or (b) to any person who the lender had reason to believe would sell or otherwise transfer the debt obligation to a U.S. resident or national or to a Canadian person.

Section 324(e) was revoked pursuant to the amendments to § 324, published June 13, 1970 (35 F.R. 9248). However, the conditions imposed by § 324(e) have been incorporated into the definition of "foreign borrowing" set forth in new § 324(a)(1) effective with respect to borrowings made on or after May 1, 1970, except that the 3-year original maturity requirement of the third alternative has been eliminated.

In connection with the first alternative (§ 324(a)(1)(i) and former § 324(e)(1)), note that a foreign branch of a U.S. bank is considered a foreign bank under § 317. However, in order for a borrowing to qualify under this category, it is not enough that the borrowing is made through an entity organized or operating as a "bank" under the laws of a foreign country. In addition to meeting that institutional test, the borrowing must meet a functional test. For example, the functional test would not be satisfied if (a) the bank is not itself the obligee on the DI's debt obligation, or (b) the bank acts as agent for a principal other than a foreign bank (see Example 7 above), or (c) the bank acts as underwriter for the DI with respect to sale of the debt obligations, or (d) the DI has reason to believe that the bank does not intend to hold the debt obligations until maturity but to sell, market or otherwise transfer such obligations. In any of these cases the borrowing will not be from a foreign bank and must qualify under one of the other categories of § 324(a)(1).

Example 9. DI desires to place with Europeans $5 million principal amount of long-term notes convertible into common stock. DI contracts with a French subsidiary of a U.S. investment bank, the subsidiary being organized as a French bank, to underwrite the placement with European nationals. The $5 million borrowing is not from a foreign bank and, therefore, must qualify under another category of § 324(a)(1) if it is to constitute a foreign borrowing.

In connection with § 324(a)(2)(ii), an industrial or commercial enterprise of a foreign government operating essentially in the private business sector shall not be considered as part of the government of that country or as an agency thereof.

Section 324(a)(1)(iii) is intended to permit debenture issues of a DI's international finance subsidiary that are sold to foreign nationals to qualify as foreign borrowing. Typically, such debentures are guaranteed as to payment of principal and interest by the parent DI, and may or may not be convertible into common stock of the parent. In order to satisfy the requirements of § 324(a)(1)(iii), the debentures must be subject to the U.S. Interest Equalization Tax ("IET"), if purchased by residents or nationals of the United States.

The requirement concerning applicability of the IET does not mean that the tax actually must be imposed on a particular U.S. resident or national. The requirement is satisfied if the nature of the debt obligation is such that under normal circumstances the tax would be imposed upon acquisition by any U.S. resident or national. Accordingly, debt obligations issued by a less-developed country corporation (exempt from the IET under Internal Revenue Code § 4916) will not satisfy the conditions of § 324(a)(1)(iii). On the other hand, a debt obligation the acquisition of which is exempt from tax under Internal Revenue Code § 4918, because previously held by a U.S. person, is not disqualified under § 324(a)(1)(iii).

To satisfy the provisions of former § 324(e)(3) (which applied to borrowings made from June 10, 1968, through April 30, 1970), the borrowing was also required to have an original maturity of at least 3 years. The term "original maturity of at least 3 years," as used in § 324(e)(3), was analogous to the term "original maturity of at least 12 months" in former § 324(a). Thus, a requirement that there be a principal repayment within 3 years disqualified the entire borrowing. Therefore, if mandatory redemption of any debenture fell within 3 years of the issue date, the entire borrowing failed to qualify as a long-term foreign borrowing. The 3-year original maturity requirement of former § 324(e)(3) was eliminated for borrowings made on or after May 1, 1970 (see § 324(a)(1)(iii)). Note also that failure to qualify the full principal amount of a foreign borrowing as long-term foreign borrowing now results only in a pro tanto reduction of proceeds.

An agreement such as described in § 324(a)(1)(iv) is not the typical agreement entered into between underwriters and a DI with respect to issuance of debentures to foreign nationals. Ordinarily, underwriters will agree not to offer or sell the debentures to persons who are nationals or residents of the United States or residents of Canada. Section 324(a)(1)(iv), by contrast, contemplates a more restrictive agreement in which the obligee agrees not to sell or otherwise transfer the debt obligation to any United States or Canadian person or to any person who the obligee has reason to believe will so sell or otherwise transfer the debt obligation.

(iv) *Borrowings made on or after May 1, 1970.* Borrowings by a DI made on or after May 1, 1970 are subject to the provisions of amended § 324, as published in the FEDERAL REGISTER in final form on June 13, 1970 (35 F.R. 9248). To qualify as long-term foreign borrowing, a borrowing must be a "foreign borrowing" and must be continuously outstanding for not less than 12 months.

Section 324(a)(2) provides that a foreign borrowing (defined in § 324(a)(1)) by a DI will qualify as long-term foreign borrowing if the foreign borrowing (including refinancing thereof as described in § 324(b)(1)) is not repaid within 12 months after its original date. A repayment is made "within 12 months" if made at any time prior to the corresponding month and day in the immediately following calendar year. For example, if a borrowing is made at any time on May 14, 1970, and is repaid at any time before May 14, 1971, the repayment would have occurred within 12 months; however, repayment at any time on May 14, 1971 would not be "within 12 months". The date of a borrowing is defined in § 1002(e)(1).

The definition of foreign borrowing contained in § 324(a)(1) incorporates the requirements formerly set forth in § 324(e) (now revoked), which are discussed in § B324–4(iii). As mentioned above, borrowings that would be subject to the Interest Equalization Tax no longer need to satisfy the 3-year original maturity requirement imposed by former § 324(e)(3). See § 324(a)(1)(iii). As a result, DIs that borrow long-term

through issuance of debentures by an international finance subsidiary (see § 323) or an overseas finance subsidiary (see Subpart N) will be able to provide for sinking fund payments to redeem debentures within 3 years after the date of issuance.

Note that borrowings made prior to May 1, 1970 will continue to be governed by the provisions of former § 324(a) and (e) as in effect on April 30, 1970, as to whether or not such borrowings qualified as long-term foreign borrowings. However, see § B324-5(ii).

A DI may qualify a foreign borrowing made on or after May 1, 1970 as long-term foreign borrowing by keeping the borrowing outstanding for at least 12 months or by making another foreign borrowing simultaneously with or prior to repayment of the immediately preceding borrowing, so long as the borrowing as refinanced remains continuously outstanding for at least 12 months. The individual foreign borrowings constituting long-term foreign borrowing may differ as to lender, amount and maturity. Accordingly, a short-term borrowing that is renewed, extended or continued for a total period of at least 12 months will qualify as long-term foreign borrowing despite the absence of express provisions for renewal, extension or continuance. However, a borrowing that is not in fact continuously outstanding for 12 months will not qualify as long-term foreign borrowing, notwithstanding a stated maturity of at least 12 months and notwithstanding provision for renewal, extension or continuance and the DI's expectation not to repay within 12 months.

DI may take a deduction under § 306 (e) or § 313(d)(1) for allocation or expenditure of proceeds of long-term foreign borrowing before the required 12-month period has elapsed. A DI that does so, however, should be certain of its ability to keep the borrowing outstanding for the prescribed 12 months because deductions with respect to borrowings that subsequently fail to satisfy § 324(a) (2) are retroactively disqualified. Failure to qualify the full principal amount of a borrowing as long-term foreign borrowing will not result in disqualification of the entire borrowing. Proceeds of the borrowing will qualify as proceeds of long-term foreign borrowing in the principal amount of the borrowing that ultimately satisfies the requirements of § 324(a)(2).

Example 10. On May 1, 1970, DI borrows $1 million from a foreign bank (X) on a 3-month note with no provision for renewal or extension. The borrowing is a foreign borrowing under § 324(a)(1)(i). On August 1, 1970, DI repays the note and borrows $1 million from another foreign bank (Y) on a 6-month note. On February 1, 1971, DI repays the loan from Y and borrows $1 million from foreign bank (Z), which DI repays on May 1, 1971. As of May 1, 1970, DI has available proceeds of long-term foreign borrowing of $1 million, which DI could expend or allocate in accordance with § 313(d)(1) or § 306(e), if reported in accordance with § 324(c). Under amended § 324, the initial 3-month foreign borrowing qualifies as long-term foreign borrowing because such borrowing, as refinanced by successive foreign borrowings, was continuously outstanding for 12 months.

Example 11. On May 1, 1970, DI borrows $200,000 from a foreign bank (X) on a 6-month note. On November 1, 1970, DI repays X and purchases all of the stock of a French corporation from an unaffiliated foreign national (Y) for $300,000, consisting of $100,000 in cash at the closing and DI's 6-month promissory note for the balance as to which Y provides the agreement specified in § 324(a)(1)(iv). On May 1, 1971, DI makes payment on its promissory note. Under § 324, the $200,000 borrowed on May 1, 1970 constituted proceeds of long-term foreign borrowing. The initial borrowing from the bank was not deemed repaid within 12 months because such borrowing, refinanced by the borrowing from Y, was continuously outstanding for 12 months.

Example 12. On May 1, 1970, DI makes a public offering to non-Canadian foreign nationals through its international finance subsidiary of $10 million principal amount of debentures maturing in 1980. Acquisition of the debentures by U.S. residents or nationals will be subject to the Interest Equalization Tax. The financing documents provide for sinking fund payments of $1 million each on November 1, 1970 and November 1, 1971, to be used by a New York trustee to purchase an equivalent amount of the debentures for redemption. The borrowing constitutes a foreign borrowing under § 324(a) (1)(iii). To qualify the entire $10 million as long-term foreign borrowing under § 324 (a)(2), DI must refinance the November 1, 1970 sinking fund payment for an additional 6 months in accordance with § 324(b)(1). If DI does not refinance, it will still have $9 million of available proceeds of long-term foreign borrowing. The remaining $1 million of proceeds is not available proceeds and, if held in the form of liquid foreign balances, is subject to § 203(c). The sinking fund payment on November 1, 1971 will not affect qualification of the portion of the borrowing that was outstanding for 12 months as of such date.

Repayment through conversion of convertible debt instruments or accelerated repayment upon default occurring within the first 12 months of a borrowing will not prevent its qualification as long-term foreign borrowing. A conversion or accelerated repayment is deemed to occur as of the maturity specified in the debt instrument involved. See the proviso in § 324(a)(2). Transfers of capital, repayment charges under § 1003, and reductions of proceeds, on the other hand, are determined in accordance with the rules otherwise applicable to repayment of long-term foreign borrowing. See § B324-11.

Example 13. On July 1, 1970, DI issues $5 million principal amount of 5-year convertible debentures through its international finance subsidiary. The entire amount of the issue is converted between February 1 and July 1, 1971. Solely for purposes of determining qualification as long-term foreign borrowing under § 324(a)(2), the conversions are deemed not to have occurred until July 1, 1975, the stated maturity of the debentures. However, transfers of capital are recognized in accordance with the usual rules for repayment upon conversion. Accordingly, DI would have a reduction of its allowable under § 1003 in 1972 for the conversions that took place in 1971. See § 1002(a)(3).

Example 14. On February 1, 1971, DI makes a public offering of $10 million principal amount of convertible debentures maturing in 1980. Sinking fund payments in the amount of $1 million are due January 15, 1972 and January 15, 1973. In March 1971, DI expends $6 million of the proceeds of the offering in making a transfer of capital, for which a deduction is taken under § 313(d) (1). In December 1971 the entire amount of the offering is converted. Under § 324, $9 million is qualified as long-term foreign borrowing. One million dollars of the borrowing is deemed repaid for purposes of § 324(a)(2) on the due date of the first sinking fund payment (January 15, 1972) and does not qualify under § 324 because such payment is within 12 months. Assuming no other relevant transactions, the conversion will result in a transfer of capital of $6 million, which will constitute a repayment charge under § 1003 in 1972 and a reduction of available proceeds ($3 million) to zero in 1971.

§ B324-5 Refinancing.

Section 324(b)(1) provides that the "refinancing" of a borrowing is deemed not to be a repayment of such borrowing or the making of a new borrowing. Section 324(b)(1) was amended as part of the change in the definition of long-term foreign borrowing applicable to borrowings made on or after May 1, 1970.

Under former § 324(b)(1), refinancing of a long-term foreign borrowing was not deemed repayment of the borrowing or the making of a new borrowing. However, refinancing was possible only for borrowings that already constituted long-term foreign borrowing, and if the refinancing was by means of another borrowing, whether from the same or another lender, the second borrowing also had to be a qualified long-term foreign borrowing. Under amended § 324 (b)(1), refinancing is not limited to long-term foreign borrowing. "Foreign borrowings" (defined in § 324(a)(1)), which may be nonrenewable, short-term borrowings, can be refinanced in order to keep them outstanding for the 12 months required to constitute long-term foreign borrowing. Such refinancing, moreover, may be accomplished by means of another "foreign borrowing" from the same or a different lender. As discussed in § B324-5(ii), a long-term foreign borrowing made prior to May 1, 1970 may be refinanced after May 1, 1970 in accordance with amended § 324(b)(1).

(i) *Refinancing under § 324(b)(1).* Satisfaction of a foreign borrowing will not be deemed a repayment if such borrowing is refinanced in the manner provided in § 324(b)(1). The refinancing borrowing must be made either prior to or simultaneously with the repayment of the initial borrowing. A borrowing drawn down on any day shall be deemed made simultaneously with a repayment occurring on the same day. On the other hand, for example, if DI repaid a foreign borrowing on July 1, 1970, and made a new foreign borrowing in the same amount from the same lender on July 2, 1970, the second borrowing would not constitute a refinancing of the first borrowing regardless of any underlying arrangement relating to the two borrowings.

DI is required to identify borrowings being refinanced and the corresponding refinancing borrowings on its books and records kept under § 203(b). If DI repays more than one initial borrowing and makes more than one refinancing

borrowing on the same day, DI must indicate (by appropriate entries on its books and records) the extent to which each new borrowing refinances each of the intitial borrowings.

If a refinancing borrowing made within 12 months after the date of the initial borrowing is for a lesser amount than the initial borrowing, the amount of proceeds of long-term foreign borrowing as of the date of the initial borrowing may not exceed the amount so refinanced. The amount of proceeds of an initial borrowing failing to qualify as proceeds of long-term foreign borrowing is not exempt at any time from § 203(c), and any deductions taken for expenditure or allocation of such proceeds are disallowed. If a DI treats proceeds of a foreign borrowing as proceeds of long-term foreign borrowing on its Annual Report Form FDI–102F for any year, and the borrowing does not thereafter meet the requirements of § 324(a)(2) by reason of a repayment within 12 months, DI must file an amended Form FDI–102F within 30 days after such repayment showing revised direct investment and liquid foreign balance entries.

If the refinancing borrowing is for a greater amount than the initial borrowing, DI may treat the excess as an additional foreign borrowing commencing on the date of the refinancing which may qualify as separate long-term foreign borrowing.

DI may refinance a foreign borrowing by making another foreign borrowing prior to and in anticipation of refinancing the initial borrowing and at a time reasonably proximate to the date of repayment of the initial borrowing. The proceeds of the refinancing borrowing in such case may not be treated as available proceeds of long-term foreign borrowing until the refinancing occurs, but the proceeds of the refinancing borrowing are, nevertheless, exempt from the liquid foreign balance restrictions of § 203(c) if the initial borrowing as refinanced qualifies as long-term foreign borrowing under § 324(a)(2).

Example 15. On May 1, 1970, DI borrows $2 million from a foreign bank for 6 months. On November 1, 1970, DI repays the borrowing in full and borrows a total of $1,500,000 from three other foreign banks which DI keeps outstanding for 6 months. Under § 324, DI has made long-term foreign borrowing in the amount of $1,500,000 as of May 1, 1970. If the unrefinanced portion ($500,000) of the May 1 borrowing was held in the form of liquid foreign balances, DI will be required to report such amount as liquid foreign balances for purposes of § 203(c).

If DI had borrowed $2,500,000 on November 1, 1970, for 6 months, DI would have made long-term foreign borrowing of $2 million as of May 1, 1970. The additional $500,000 constitutes a new foreign borrowing which qualifies as long-term foreign borrowing if it is not repaid for 12 months, i.e., until November 1, 1971.

Example 16. On May 1, 1970, DI borrows $1 million from foreign bank (W) for 3 months and expends the proceeds in making transfers of capital to Schedule A, for which a deduction is taken under § 313(d)(1). On August 1, 1970, DI repays the borrowing from W and borrows $1 million from foreign bank (X) and $1 million from foreign bank (Y) for 9 months. DI records the borrowing from X as a refinancing of the borrowing from W and the borrowing from Y as a new borrowing the proceeds of which DI expends in Schedule C for which a deduction is taken under § 313(d)(1). On May 1, 1971, DI repays the borrowings from X and Y and borrows $1 million from foreign bank (Z) for 3 months. DI records the borrowing from Z as a refinancing of the borrowing from Y, which is necessary to qualify the borrowing from Y under § 324(a)(2). DI also records a transfer of capital to Schedule A under § 312(a)(7) resulting from the repayment of the borrowing from X which was a refinancing of the borrowing from W. On August 1, 1971, DI repays the borrowing from Z and correctly records a transfer of capital to Schedule C under § 312(a)(7).

Example 17. On May 1, 1970, DI borrows $1 million from a foreign national (X), who provides the agreement specified in § 324(a)(1)(iv). DI expends the proceeds in Schedule B, for which a deduction is taken under § 313(d)(1). On August 1, 1970, DI repays the borrowing from X and borrows $2 million from foreign national (Y), who provides the agreement specified in § 324(a)(1)(iv). DI records $1 million of the borrowing from Y as a refinancing of the borrowing from X and $1 million as a new borrowing which DI expends in Schedule C. On August 1, 1971, DI repays $1 million of the borrowing from Y. In the records that must be kept pursuant to § 203(b), DI should indicate whether such repayment is attributable to the part of the Y borrowing used to refinance the X borrowing (chargeable to Schedule B) or to the part constituting new borrowing (chargeable to Schedule C).

Example 18. On May 1, 1970, DI borrows $1 million from foreign bank (X) on a 3-month note. On July 1, 1970, DI borrows $1 million from foreign bank (Y) for 10 months in anticipation of using the proceeds to refinance the borrowing from X, which must be repaid on August 1, 1970. In this case, DI may not treat the proceeds of the borrowing from Y as available proceeds until used to repay the X borrowing; however, the proceeds of the borrowing from Y are not subject to the limitation of § 203(c). On August 1, 1970, DI repays the borrowing from X and indicates on its books and records that the borrowing from Y is to refinance the borrowing from X as of that date. On May 1, 1971, DI repays the borrowing from Y. Accordingly, the borrowing from X is qualified as long-term foreign borrowing.

Example 19. On September 1, 1970, DI borrows $1 million on a 13-month note from a foreign bank and allocates the proceeds under § 306(e) to Schedule C positive direct investment for 1970 and so reports on its Annual Report Form FDI–102F for such year. DI repatriates the proceeds as of December 31, 1970, and thereafter holds them in acocrdance with § 306(e)(2). On August 1, 1971, DI repays the borrowing and does not refinance. Since the borrowing was not outstanding for 12 months, DI's deduction under § 306(e) for 1970 is disqualified, and DI must file an amended Form FDI–102F for 1970. Such amended report will show a decrease of $1 million in outstanding long-term foreign borrowing and in deductions for expenditure and allocation of available proceeds. If the proceeds were held in the form of liquid foreign balances, the amended report must also show a corresponding increase in such balances. If the amended Form FDI–102F for 1970 shows positive direct investment or liquid foreign balances in excess of DI's allowables, DI will be in noncompliance for 1970.

(ii) *Refinancing of long-term foreign borrowing made prior to May 1, 1970.* A long-term foreign borrowing made prior to May 1, 1970 that satisfied the requirements of § 324 as then in effect, refinanced on or after May 1, 1970, with a foreign borrowing as defined in § 324(a)(1), shall not be deemed to have been repaid. See § 324(b)(1). Similarly, a certificate filed with respect to a pre-May 1, 1970, long-term foreign borrowing, as to which category 2 or 3 of Item 8.A on Form FDI–106 (issued May 1969) was checked, will be deemed a certification that DI will refinance such borrowing as provided in amended § 324(b)(1).

Example 20. On July 1, 1969, DI made a $1 million borrowing for 2 years from foreign bank (X), which qualified as a long-term foreign borrowing under § 324 as then in effect. On July 1, 1970, DI prepays the borrowing in full and on the same day makes a $1 million borrowing for 3 months from foreign bank (Y), which constitutes a foreign borrowing under new § 324(a)(1). Under § 324(b)(1), the long-term foreign borrowing from X is deemed not to have been repaid for purposes of the regulations because it was refinanced by a foreign borrowing.

A borrowing made by a DI prior to May 1, 1970 evidenced by a debt instrument containing a stated maturity of at least 12 months will continue to be treated as a long-term foreign borrowing even though repaid on or after May 1, 1970, prior to such maturity, provided that the principal amount repaid is refinanced in accordance with § 324(b)(1) so that the borrowing (as refinanced) will have been continuously outstanding for at least 12 months. Similarly, a borrowing made by a DI prior to May 1, 1970 evidenced by a debt instrument with a stated maturity of less than 12 months but containing express provisions for renewal, extension or continuance for a total period of at least 12 months (which the DI reasonably expected to renew, extend or continue) need not, commencing May 1, 1970, be rolled over in accordance with its terms, provided that the DI refinances such borrowing (with the same or another lender) in accordance with new § 324(b)(1) so that the borrowing (as refinanced) will have been continuously outstanding for at least 12 months.

The amendments to § 324 eliminated the 3-year original maturity requirement contained in former § 324(e)(3) applicable to borrowings that would be subject to the Interest Equalization Tax. See § 324(a)(1)(iii). Although elimination of the 3-year requirement affects only borrowings made on or after May 1, 1970, OFDI will permit DIs to repay within the first 3 years any part of a long-term foreign borrowing that qualified on the basis of former § 324(e)(3), provided that the principal amount repaid is refinanced in accordance with § 324(b)(1) so that the borrowing (as refinanced) will have been continuously outstanding for at least 3 years. Consequently, a DI may now repay (through repurchase of debentures, sinking fund redemptions, etc., during the first 3 years of the borrowing) a long-term foreign borrowing made prior to May 1, 1970, that was subject to former § 324(e)(3), provided that the DI refinances such repayment (valued as the principal

amount of the indebtedness surrendered) in accordance with § 324(b)(1).

In determining the amount of foreign borrowing that is outstanding for 12 months or for 3 years, a DI shall disregard the amount of any repayment occurring by reason of acceleration upon default or by conversion of convertible debt instruments.

Example 21. On February 1, 1970, DI borrowed $1 million from foreign bank (X) on a 6-month note with express provisions for renewal for a total period of 12 months which DI expected to exercise. On August 1, 1970, DI repays the borrowing from X and borrows $1 million from foreign bank (Y) on terms more favorable than a renewal of the borrowing from X. DI, in this case, may continue to treat the $1 million borrowed initially on February 1, 1970, as long-term foreign borrowing if DI keeps the entire amount of the borrowing from Y (which also may be refinanced by other borrowings in accordance with § 324(b)(1)) outstanding until February 1, 1971.

Example 22. On March 1, 1969, DI issued 12-year debentures through its international finance subsidiary in the principal amount of $10 million. The borrowing qualified as long-term foreign borrowing under § 324 (a) and (e)(3) as then in effect. Although by the terms of the offering no sinking fund payments are required within 3 years, DI may redeem any or all of the debentures after May 1, 1970, if DI refinances such redemptions by making foreign borrowings as defined in § 324(a)(1) so that $10 million principal amount of indebtedness will have been continuously outstanding for at least 3 years after March 1, 1969.

§ B324–6 Proceeds of long-term foreign borrowing.

The term "proceeds of long-term foreign borrowing" is defined in § 324(c) to mean the gross amount or value received from a long-term foreign borrowing (before deducting discounts, commissions or fees) less repayment of principal of such borrowing. A borrowing must be reported to OFDI on the DI's first required periodic report following the borrowing (whether quarterly or annual) in order for funds received from the borrowing to qualify as proceeds of long-term foreign borrowing. Therefore, if a DI contemplates using funds received from a borrowing as an offset to direct investment under § 306(e) or § 313(d)(1) at any time in the current or succeeding years, the borrowing should be reported on Form FDI–102 or FDI–102F, whichever is first required thereafter. If a borrowing is not reported, the DI will not have available proceeds from such borrowing and will not be subject to the restriction on positive net transfer of capital under § 203(d)(1). Funds received from an unreported borrowing will, if held as liquid foreign balances, be subject to the end-of-month restrictions of § 203(c).

Example 23. On March 1, 1970, DI's international finance subsidiary sells a public offering in Europe of 12-year, $20 million face amount convertible debentures in a form that qualifies as long-term foreign borrowing. The debentures are sold at an aggregate discount of $500,000 and DI pays $500,000 in underwriting fees. DI thus receives $19 million net as a result of the borrowing. However, for purposes of § 324(c), the proceeds of the borrowing are nevertheless $20 million. DI reports this borrowing on Form FDI–102 for the second quarter of 1970. Accordingly, DI has $20 million in available proceeds, including the $1 million representing discount and fees. DI may allocate a full $20 million to positive direct investment under § 306(e) even though only the $19,000,000 received is repatriated before the end of the year. DI may retain abroad $1 million of interest earned on proceeds of the borrowing or alternatively may transfer $1 million abroad and hold in liquid foreign balances a full $20 million without regard to the limitations of § 203(c). Thereafter, the full $20 million will be treated as available proceeds for all purposes of the regulations.

Example 24. DI's international finance subsidiary issues debentures in aggregate principal amount of $10 million, in a form that qualifies as a long-term foreign borrowing. Attached to each debenture is a warrant entitling the holder to purchase N number of shares of DI's common stock at P price. DI obtains the opinion of its independent financial counsel that the value attributable to the warrants (based on coupon rate of the debentuers anc the interest-cost saving to the issuer over the life of the issue represented thereby in relation to prevailing market rates for nonconvertible debt issues, or on some other basis acceptable to OFDI) is $1 million. DI has made a long-term foreign borrowing, the proceeds of which are $9 million. The $1 attributable to the warrants is not proceeds of long-term foreign borrowing.

§ B324–7 Available proceeds.

"Available proceeds" are defined in § 324(d) as proceeds of long-term foreign borrowing that have not been expended in a transfer of capital for which a deduction was made under § 313(d)(1), or allocated to positive direct investment and deducted therefrom under § 306(e), and are, therefore, still available for use as an offset to direct investment.

Although available proceeds are reduced by expenditure or allocation, DI may subsequently change the scheduled area in which the deduction is taken by reallocation under § 203(d) (2) or (3). See § B324–10. (During 1968, § 324(c) contained a provision whereby the return of proceeds of long-term foreign borrowing to the DI by an AFN, by reason of repayment or other liquidation of debt or equity interests in such AFN acquired with such proceeds, was treated as an increase in available proceeds of long-term foreign borrowing, and not as a transfer of capital under § 312(b).)

Example 25. During 1966, DI made a long-term foreign borrowing of $15 million, and used the entire amount that same year to acquire a debt obligation of a Schedule B AFN (B). During 1967, B repaid $5 million principal amount of the $15 million debt obligation, and during 1968, B repaid another $5 million principal amount of such debt obligation. At the end of 1968, DI allocated $2 million of the $10 million returned (considered to be "available proceeds" under the 1968 regulations) to a positive net transfer of capital to Schedule C. At the end of 1968, DI had proceeds of long-term foreign borrowing of $15 million: $8 million were available proceeds, $5 million were expended in B, and $2 million were allocated to Schedule C.

In March 1969, B repaid the final $5 million principal amount of its debt obligation to DI. This repayment is recognized as a § 312(b) negative transfer of capital from B to DI and does not change the amount of available proceeds. After the March transaction, DI held $8 million of available proceeds, $5 million of returned proceeds and $2 million of allocated proceeds. In June 1970, DI expended the cash received from B in March 1969 to acquire stock of new Schedule A AFN. This constituted a transfer of capital under § 312(a). DI received no deduction with respect to this transfer of capital since the funds expended were not available proceeds. At the end of 1970, DI allocates $4 million of the available proceeds to positive direct investment in Schedule C. At the end of 1970, DI still has $15 million of proceeds of long-term foreign borrowing, $4 million of which are available proceeds, $5 million of which are considered to be expended in B, and $6 million are allocated to C.

§ B324–8 Expenditure of available proceeds and deduction from net transfer of capital.

If a DI expends available proceeds of long-term foreign borrowing in a transfer of capital to an AFN (other than a Canadian AFN), the amount of such proceeds so expended is deducted from net transfer of capital to the appropriate scheduled area (§ 313(d)(1)). The deduction is mandatory when available proceeds are so expended.

Example 26. DI acquires all the stock of an Argentinian company from an unaffiliated foreign national (X). The purchase price is $4 million, $1 million of which is payable in cash at the closing. The balance is to be paid in three equal annual installments of $1 million (together with accrued interest) commencing 1 year from the date of closing. Assuming the borrowing qualifies as long-term foreign borrowing, DI's net transfer of capital to Schedule A is $1 million (i.e., a $4 million transfer of capital under § 312(a) (1) resulting from the stock acquisition, from which is deducted the $3 million available proceeds of long-term foreign borrowing expended in making that transfer of capital pursuant to § 313(d)(1)).

Example 27. DI purchases from unaffiliated foreign nationals all outstanding stock of a closely held German corporation. In exchange therefor, DI delivers to the sellers $5 million principal amount of 1-year debentures convertible into common stock of DI, that qualify as a long-term foreign borrowing. DI has made a $5 million transfer of capital to the German corporation and receives a deduction under § 313(d)(1) in an equal amount. Assuming no other transactions during the year, DI's net transfer of capital to Schedule C during the year will be zero.

Example 28. In December 1968, DI made a $5 million long-term foreign borrowing. In January 1969, DI loaned the $5 million to a Schedule A AFN (A) on A's 6-month note. Accordingly, DI made a $5 million transfer of capital and received a deduction under § 313 (d)(1), so that its net transfer of capital to Scheule A at the end of the first quarter was zero. In July 1969, A repaid the $5 million, as a result of which there was a § 312(b) transfer of capital from A to DI. In August 1969, DI loaned the $5 million to a Schedule B AFN (B), resulting in a § 312(a) transfer of capital to Schedule B. Assuming no other relevant transactions during the year, DI has made positive direct investment of $5 million to Schedule B. Under § 203(d)(2), DI may allocate the proceeds to such positive direct investment in Schedule B, if DI complies with the reporting and repatriation requirements of § 203(d)(2). If such allocation is made, DI must recognize a transfer of capital to Schedule A of $5 million (thereby effectively canceling the July § 312 (b) transfer from A to DI). Note that a § 313(d)(1) deduction cannot be taken with respect to the 1969 loan to B, but the

§ 203(d)(2) reallocation has the same effect as a § 313(d)(1) deduction.

Example 29. In November 1968, DI's international finance subsidiary publicly issued convertible debentures in principal amount of $25 million, which qualified as a long-term foreign borrowing. In February 1969, DI purchased machinery with $5 million of available proceeds derived from the public issue and installed the machinery in its Australian branch (B). Assuming that the transfer of machinery to B results in a net increase of $5 million in B's assets and there are no other relevant transactions during 1969, DI's net transfer of capital to Schedule B during 1969 is zero, because the $5 million transfer of capital is offset by a deduction in an equal amount of available proceeds of long-term foreign borrowing expended in such transfer of capital, pursuant to § 313(d)(1).

Example 30. In December 1968, DI's international finance subsidiary publicly issued convertible debentures in principal amount of $20 million which qualified as a long-term foreign borrowing. In February 1969, DI expended $10 million of available proceeds of such borrowing to acquire the assets of a German corporation, which DI organized as a direct branch. Upon acquisition, net assets of the branch (disregarding DI's equity interest) were $10 million. During the remainder of 1969, DI made no further debt or equity investment in the branch. However, after acquisition by DI, the branch incurred a loss in 1969 of $500,000, so that its net assets at the end of 1969 were $9,500,000. DI has no other Schedule C AFNs. Although DI's net transfer of capital to the German branch during 1969 would normally be $9,500,000 (by operation of § 313(b)), the $10 million expended in acquisition of the branch is offset by a $10 million deduction under § 313(d)(1), because the acquisition was made with available proceeds. Therefore, after taking into account the loss of $500,000, DI has a negative net transfer of capital to Schedule C during 1969 of $500,000.

Example 31. In January 1969, DI borrowed $5 million from a foreign bank, which qualified as a long-term foreign borrowing. During the same month, DI loaned the $5 million to a Canadian AFN. The proceeds so expended are still available proceeds. (See § 324(d).) No deduction with respect to their expenditure was received under § 313(d)(1) because § 1103 excludes Canada from Schedule B for purposes of § 313 (a) and (b). The provisions of § 203(d)(1) apply to available proceeds held in Canada as of yearend.

§ B324–9 Allocation of available proceeds.

A DI may reduce positive direct investment during a year by "allocating" available proceeds of long-term foreign borrowing (made during the same or a prior year) to such positive direct investment. Allocation is accomplished when (a) an entry is made on the books and records maintained by DI pursuant to § 203(b); (b) the allocation and deduction are reported on Form FDI–102F for the year in which made; and (c) the allocated proceeds, as of the end of the year in which allocation is made, are repatriated to the United States and are not held in any form of foreign property.

Whereas deductions under § 313(d)(1) are confined to transfers of capital (for purpose of calculating the amount of net transfer of capital), deductions for allocation under § 306(e) are applied to direct investment (comprising net transfer of capital and reinvested earnings).

Example 32. DI has five wholly owned incorporated AFNs in Schedule B. During 1969, DI is authorized to make positive direct investment of $1 million in Schedule B. In 1969, the Schedule B AFNs have earnings of $1,400,000 and pay no dividends; DI's net transfer of capital to Schedule B is zero; and positive direct investment is, therefore, $1,400,000. In November 1969, DI makes a borrowing from a foreign bank of $900,000 which qualifies as a long-term foreign borrowing under § 324 and deposits the $900,000 in a demand deposit in a London bank. To reduce Schedule B positive direct investment to the authorized $1 million for 1969:

(a) DI repatriates $400,000 to the United States by December 31, 1969, as required by § 306(e)(1)(iii), and invests the $400,000 in bonds of a U.S. corporation.

(b) Thereafter, DI enters an allocation on its books and records, as required by § 306(e)(1)(i) and deducts $400,000 from positive direct investment on its FDI–102F for 1969, as required by § 306(e)(1)(ii).

Accordingly, DI has made positive direct investment of $1 million in Schedule B for 1969. As to 1970 and subsequent years, DI holds $500,000 in available proceeds ($900,000 less $400,000 allocated).

During 1970, DI lends its AFNs in Schedule B $900,000, composed of the $500,000 of available proceeds deposited in the London bank and $400,000 of allocated proceeds, liquidating its holding of U.S. corporate bonds. DI receives a deduction under § 313(d)(1) of $500,000 for the transfer of capital made with the available proceeds, but does not receive a deduction for the transfer of capital made with the $400,000 of previously allocated proceeds.

Example 33. DI has three Schedule C AFNs, X, Y, and Z, and a $200,000 Schedule C allowable. In November 1968, DI has secured a commitment for a line of credit from a foreign bank of up to $5 million for a period of 5 years. During 1969, the following transactions take place:

(a) X has $175,000 in earnings and pays no dividends. X repays $100,000 of a loan from DI and thereby satisfies a debt obligation of X held by DI.

(b) Y has $25,000 of earnings and pays no dividends. DI performs services on behalf of Y worth $400,000, for which DI is not paid at the end of 1969.

(c) Z has $50,000 of earnings and pays no dividends. DI leases machinery having a value of $500,000 to Z for a period of 10 years.

DI thus has Schedule C reinvested earnings of $250,000 and a positive net transfer of capital of $800,000, resulting in positive direct investment of $1,050,000, only $200,000 of which is authorized. During December 1969, DI takes down $850,000 under its line of credit, repatriates the funds to the United States, and utilizes the funds to make a payment to a U.S. lender on a real estate loan. Thereafter, pursuant to § 306(c)(1), DI records an allocation of $850,000 in its § 203(b) books and reports the allocation on its Form FDI–102F for 1969. DI's positive direct investment in Schedule C after the deduction is $200,000.

Example 34. DI has one Schedule C AFN, a direct branch of the DI, and zero Schedule C allowable. During 1969, DI transfers used machinery of a value of $250,000 to its Schedule C branch, and the branch has $100,000 of earnings, all of which is retained, thereby increasing branch net assets by $350,000. In December 1969, DI makes a long-term foreign borrowing from a foreign bank of $350,000, repatriates the proceeds thereof to the United States and deposits them in a New York bank. Thereafter, DI makes an entry in its § 203(b) books and reports an allocation in its Form FDI–102F for 1969. DI's positive direct investment in Schedule C is zero.

Example 35. In 1968, DI made a long-term foreign borrowing of $10 million and expended or allocated $8 million of the proceeds thereof to transfers of capital in Schedules A and C. In December 1968, DI also loaned $2 million of such proceeds on 6-month terms to a Canadian AFN. In June 1969, the 6-month notes were renewed for another 6 months. During 1969, DI has positive direct investment of $3 million in Schedule B and a $1 million allowable in Schedule B. In December 1969, DI causes its Canadian AFN to repay the loan to the DI, places the funds on deposit in a New York bank, makes an entry in its § 203(b) books and reports an allocation and deduction of $2 million in its Form FDI–102F for 1969. DI's positive direct investment in Schedule B is $1 million.

An allocation that is made under § 306(e) to positive direct investment calculated worldwide by a DI electing § 503 is deemed made in each scheduled area in proportion to the amount of positive direct investment made in each such area. An allocation to combined Schedules B/C positive direct investment by a DI electing § 507 is similarly apportioned. See § B306–7.

§ B324–10 Allocation of expended proceeds and reallocation of previously allocated proceeds.

Section 203(d)(2) permits a DI expending proceeds of long-term foreign borrowing, and making a corresponding § 313(d)(1) deduction during 1968 or in subsequent years, to make unlimited successive deductions, in the same or successive years, from positive direct investment in other scheduled areas.

Under § 203(d)(3), a direct investor allocating proceeds of long-term foreign borrowing to positive net transfer of capital during 1968 or to positive direct investment in succeeding years may thereafter reallocate such proceeds to positive direct investment in other scheduled areas.

Whenever a deduction against positive direct investment is made under § 203(d) (2) or (3), a transfer of capital in an amount equal to the deduction must be recognized in the scheduled area in which the last prior deduction was made.

Allocation of expended proceeds under § 203(d)(2) is accomplished in a manner similar to allocation of available proceeds under § 306(e). Both sections require the DI to make appropriate entries in the books and records maintained pursuant to § 203(b), and the allocation must be reported on the DI's next annual report (Form FDI–102F). Allocations under § 203(d)(2) are subject to the repatriation requirements of that section.

Reallocation under § 203(d) (2) and (3) of proceeds previously deducted under § 313(d)(1), § 203(d), or § 306(e) requires appropriate bookkeeping entries. The DI must reflect the reallocation on books and records required to be kept by § 203(b) and the corresponding deduction together with the transfer of capital to the appropriate scheduled area on the next annual report (Form FDI–102F). Reallocations made pursuant to § 203(d)(3) are subject to the proscriptions of

§ 306(e) with respect to the form in which the underlying proceeds may be held.

No allocation or reallocation under § 203(d) (2) or (3) may take place with respect to any part of a long-term foreign borrowing that has been repaid since proceeds are extinguished by repayment.

Example 36. During 1968, DI made a long-term foreign borrowing of $5 million, and allocated the proceeds to positive net transfer of capital to Schedule A (under § 313(d) (1) of the 1968 regulations). At the end of 1970, DI has positive direct investment of $6 million in Schedule C, and has repaid $1 million of the borrowing. Section 203(d) (3) permits DI to reallocate $4 million (outstanding proceeds) previously allocated to Schedule A during 1968 to the Schedule C positive direct investment, thereby reducing it to $2 million, by recording the reallocation in the books and records required in § 203(b), by reporting the reallocation and deduction in the annual report (Form FDI-102F) for 1970, and by holding the $4 million of allocated proceeds, as of the end of 1970, in a form permitted by § 306(e) (2). Upon such reallocation, DI must recognize a transfer of capital to Schedule A of $4 million.

Example 37. During 1968, DI made a long-term foreign borrowing of $2 million and used the proceeds to extend a 1-year loan to a Schedule B AFN (B). During 1969, B repays the loan, constituting a § 312(b) transfer of capital to DI, and DI invests the $2 million in bonds of a U.S. corporation. During 1969, DI allocates (pursuant to § 203 (d) (2)) the $2 million to positive direct investment in Schedule C by making an entry in the books and records required by § 203 (b), and by reporting the allocation and deduction on the annual report (Form FDI-102F) for 1969. DI must, as of year-end, continue to hold the $2 million in the U.S. corporate bonds (or in some other form of U.S. property), unless the $2 million is expended in making a further transfer of capital to an AFN. As a result of the allocation, positive direct investment in Schedule C is reduced by $2 million, but DI must recognize a § 312 (a) transfer of capital of $2 million to Schedule B.

Example 38. DI makes a long-term foreign borrowing of $3 million in March 1969 and loans the proceeds to a Schedule B AFN (B), recognizing a § 312(a) transfer of capital to B and making a deduction from net transfer of capital to that scheduled area under § 313 (d) (1). In October 1969, B repays the loan and DI then loans the $3 million to a Schedule A AFN, resulting in a § 312(b) transfer of capital from B and a § 312(a) transfer of capital to A. On the annual report (Form FDI-102F), however, DI makes a § 203(d) (2) allocation of the $3 million to positive direct investment in Schedule C, resulting in a deduction of $3 million from positive direct investment in Schedule C and a § 312(a) transfer of capital in the same amount to Schedule B. DI is permitted to leave the $3 million proceeds actually invested in Schedule A, notwithstanding the allocation to Schedule C.

Example 39. During 1967, DI made a long-term foreign borrowing of $5 million and, in turn, lent the funds received to a Schedule A AFN for a 3-year term, repayment to be made in full at maturity. During 1969, DI desires to allocate such proceeds to positive direct investment in Schedule C. This is not permissible. The proceeds of the borrowing do not qualify for allocation under § 203(d) (2) since they were expended prior to 1968.

§ B324–11 Repayment of long-term foreign borrowing.

Repayment of long-term foreign borrowing occurs whenever the DI reduces its indebtedness created by the borrowing, whether by cash repayment, delivery of equity securities upon conversion, open market purchases of its obligations or by making sinking fund payments to a trustee (domestic or foreign) to be used by the trustee to redeem the DI's obligations. The amount of a repayment is the amount of indebtedness surrendered, regardless of the value of the funds or other property transferred by the DI in making the repayment (see Example 45 below).

Repayment of long-term foreign borrowing reduces the amount of proceeds held by the DI to the extent of the repayment. In addition, a transfer of capital must be recognized by the DI (under § 312(a)(7)) upon repayment of the long-term foreign borrowing to the extent that the proceeds were expended in making transfers of capital to AFNs or were allocated to positive direct investment. The transfer of capital is incurred in the scheduled area in which the deduction from net transfer of capital or positive direct investment was taken. If, as a result of allocation or reallocation, deductions were taken in successive scheduled areas, the transfer of capital is recognized in the last scheduled area in which a deduction was taken. However, if the total deductions with respect to the amount of the borrowing repaid were last taken in two or more scheduled areas, the transfer of capital resulting from repayment will be charged proportionally, based on the last deductions taken in each scheduled area.

Example 40. In 1968, DI made a long-term foreign borrowing of $1 million and loaned the proceeds to a Schedule C AFN, receiving a deduction with respect to such transfer of capital under § 313(d) (1). During 1969, DI repays the long-term foreign borrowing. DI must recognize a $1 million transfer of capital to Schedule C under § 312(a) (7).

Example 41. In 1968, DI made a long-term foreign borrowing of $1 million, and allocated the proceeds to a positive net transfer of capital in Schedule A, thereby receiving a deduction from Schedule A net transfer of capital under § 313(d) (1). In 1969, DI reallocated, under § 203(d) (3), the proceeds to positive direct investment in Schedule C, recognizing a transfer of capital to Schedule A and a deduction from positive direct investment in Schedule C, each in the amount of $1 million. If, in 1970, DI repays the long-term foreign borrowing, DI must recognize a transfer of capital under § 312 (a) (7) to Schedule C, since the last deduction with respect to the proceeds was received in that scheduled area.

Example 42. In 1968, DI made a long-term foreign borrowing of $1 million. DI expended $600,000 of the proceeds in a transfer of capital to Schedule B, receiving a deduction under § 313(d) (1) from net transfer of capital in Schedule B, and allocated the remaining $400,000 to a positive net transfer of capital to Schedule C, receiving a similar deduction in Schedule C. During 1969, DI repays the long-term foreign borrowing and DI recognizes a $600,000 transfer of capital to Schedule B and a $400,000 transfer of capital to Schedule C, under § 312(a) (7).

Example 43. In 1968, DI made a long-term foreign borrowing of $1 million. DI expended $500,000 of the proceeds in a transfer of capital to Schedule A, allocated $200,000 to a positive net transfer of capital in Schedule B, and allocated the remaining $300,000 to a positive net transfer of capital in Schedule C. Appropriate deductions were also taken from net transfer of capital in each scheduled area, under § 313(d) (1). During 1969, DI allocated to Schedule C, under § 203(d) (2), $250,000 of the proceeds previously expended in Schedule A, thereby recognizing a transfer of capital to Schedule A and receiving a deduction from positive direct investment in Schedule C in the same amount. If, in 1970, DI repays the long-term foreign borrowing, DI must recognize transfers of capital, under § 312(a) (7), in the amount of $250,000 to Schedule A, $200,000 to Schedule B, and $550,000 to Schedule C.

Example 44. In February 1969, DI makes a long-term foreign borrowing of $1,000,000 and loans the proceeds to a Schedule C AFN (C), receiving a deduction with respect to the transfer of capital under § 313(d) (1). In March 1970, C repays the loan, resulting in a $1 million transfer of capital under § 312 (b). In June 1970, DI repays the long-term foreign borrowing. The repayment is recognized as a transfer of capital to Schedule C of $1 million under § 312(a) (7), since the last deduction with respect to the proceeds was received in that scheduled area. Note that the § 312(b) transfer of capital in March 1970 will offset the June 1970 § 312(a) (7) transfer of capital for purposes of calculating the net transfer of capital to Schedule C during 1970.

The transfer of capital to be recognized upon repayment of a long-term foreign borrowing is in the amount of the indebtedness surrendered, which may be different from the value of the actual repayment.

Example 45. In March 1968, DI made a $10 million offering of debentures which qualified as long-term foreign borrowing. DI expended the proceeds in Schedule C and took a deduction of $10 million from net transfer of capital in Schedule C. In 1970, DI purchases all of the debentures at a total cost of $8 million. DI will be charged with a § 312(a) (7) transfer of capital to Schedule C of $10 million for 1970.

Repayment of a long-term foreign borrowing does not result in a transfer of capital if the proceeds of such borrowing are available proceeds at the time of repayment. Generally, available proceeds are those proceeds that have not been expended or allocated and with respect to which a deduction under § 313(d) (1) or § 306(e) has not been received. Proceeds expended or allocated during the years 1965 through 1968 will be considered available proceeds if returned to the DI prior to December 31, 1968, and not thereafter expended or allocated.

Example 46. DI makes a $1 million long-term foreign borrowing during 1969 and loans the proceeds to a domestic subsidiary for working capital purposes. Such proceeds are not allocated to positive direct investment at the end of 1969. If such proceeds are not expended in 1970, repayment of the long-term foreign borrowing in 1970 will not be a transfer of capital under § 312(a) (7).

Example 47. During 1968, DI made a $1 million long-term foreign borrowing and lent

the proceeds, during May 1968, to a Schedule B AFN (B) on a 6-month note, receiving a deduction with respect to the transfer of capital under § 313(d)(1). In November 1968, B repaid the DI. Under the regulations in effect during 1968, the repayment did not constitute a § 312(b) transfer of capital from B to DI, but did constitute an increase in available proceeds of $1 million. In 1969, without having again expended the $1 million in a transfer of capital or allocated such proceeds, DI repays the long-term foreign borrowing. DI has not made a transfer of capital under § 312(a)(7). If B's note had been for 9 months and repayment occurred in February 1969, DI would recognize a § 312(b) transfer of capital from B in 1969, the repayment would not have constituted an increase in available proceeds, and repayment of the long-term foreign borrowing in 1969 would be recognized as a $1 million transfer of capital to Schedule B under § 312(a)(7).

Delivery of a DI's equity securities to holders of debt instruments issued by the DI (or its international finance subsidiary) in connection with a long-term foreign borrowing, pursuant to the exercise of conversion or similar rights, is deemed a repayment of the borrowing in the principal amount of indebtedness surrendered. See § 324(b)(2). The conversion will result in repayment of the borrowing (and reduction of proceeds) in the year the delivery of stock occurs. However, for purposes of § 1003, transfers of capital resulting from such repayment by conversion are not recognized until the year following the conversion. Thus, for example, if a DI's international finance subsidiary issues $20 million face amount of debentures convertible into stock of the parent and invests the proceeds in Schedule C AFNs of the parent, conversion by the foreign debenture holders of $1 million face amount into stock in 1970 (the stock being delivered in 1970) results in a $1 million repayment of the borrowing (i.e., a $1 million transfer of capital to Schedule C) in 1970 (see § 324(b)(2)). However, assuming such repayment in 1970 is generally authorized by § 1002(a)(3), reduction in the DI's Subpart E allowables under § 1003 will be postponed until 1971.

Surrender of debentures upon exercise of attached warrants is treated similarly. However, since a portion of the funds received from sale of debentures with warrants attached is attributed to the warrants, the DI did not receive proceeds of long-term foreign borrowing to the full extent of the face amount of the issue. Therefore, where a debenture is surrendered, a ratable portion of the principal amount will not result in repayment of a long-term foreign borrowing.

Example 48. During 1968, DI's international finance subsidiary issued $10 million principal amount of debentures with warrants attached, entitling holders to purchase 10 shares of DI's common stock at $100 and to present the debenture, having a principal amount of $1,000, in payment for the stock. DI's independent financial counsel valued the warrants in an aggregate amount of $1 million. Therefore, DI realized $9 million proceeds of long-term foreign borrowing from sale of the debentures with warrants attached. Also during 1968, DI's international finance subsidiary loaned the entire $9 million to DI's Schedule B AFNs, resulting in a § 313(d)(1) deduction. In 1969, upon the presentation of a warrant and debenture, and delivery of common stock to the holder, there is a repayment of the debenture, a reduction of proceeds of long-term foreign borrowing (to the extent such proceeds were received from sale of the debenture), and a transfer of capital under § 312(a)(7). (The transfer of capital occurs because such proceeds were invested in Schedule B and a deduction under § 313(d)(1) had been received during 1968.) However, although the amount of repayment is $1,000, the proceeds of long-term foreign borrowing received from sale of the debenture were $900. Accordingly, the transfer of capital to Schedule B and the corresponding reduction of proceeds will be $900. Recognition of the transfer of capital, which is authorized by § 1002(a)(3), will be postponed until 1970, when the reduction to Subpart E allowables occurs (see §§ 1002 (a)(3) and 1003).

Generally, whether a transfer of capital or a reduction of available proceeds results from repayment of a long-term foreign borrowing may be ascertained by a DI from the books and records kept pursuant to § 203(b). Accordingly, when a DI repays a long-term foreign borrowing, all proceeds of which have been expended or allocated, the DI must report a transfer of capital under § 312(a)(7). If a DI has not expended or allocated any part of a particular long-term foreign borrowing, repayment of the borrowing (in whole or in part) results in a reduction of available proceeds. However, if a portion of proceeds of a borrowing has been expended or allocated, while the remainder has not been expended or allocated and thus constitutes available proceeds, the effect of partial repayment cannot be ascertained from the DI's books and records. In such case, any repayment shall be treated first as a reduction of available proceeds (until the available proceeds are reduced to zero) and then as a transfer of capital under § 312(a)(7). On the other hand, if a long-term foreign borrowing is in the form of debentures convertible into stock of the DI and a portion of the proceeds has been expended or allocated and the remainder is held as available proceeds, OFDI will permit the DI to elect whether repayments resulting from conversions will be treated as reductions of available proceeds or as transfers of capital under § 312(a)(7).

Example 49. In March 1968, DI made a long-term foreign borrowing from a foreign bank. DI gave the bank 20 notes, each for $1 million. At the end of 1968, DI had expended or allocated $10 million of the proceeds. By June 1969, DI had expended an additional $5 million. Accordingly, there remained $5 million of available proceeds. On October 1, 1969, DI repaid $2 million. The repayment did not constitute a transfer of capital under § 312(a)(7); rather, available proceeds were reduced from $5 million to $3 million.

Example 50. During 1969, DI's international finance subsidiary made a public issue of debentures convertible into common stock of DI. The issue qualified as a long-term foreign borrowing. The proceeds of such borrowing were $20 million. As of the end of June 1970, DI had expended $15 million of these proceeds in transfers of capital to a Schedule B AFN and $5 million remained as available proceeds. During July 1970, $2 million principal amount of debentures was converted into common stock of the DI. DI may treat the conversions either as reductions of available proceeds or as transfers of capital to Schedule B.

§ B324–12 Recordkeeping.

Because funds or property that are proceeds of long-term foreign borrowing have special status under the regulations, it is necessary that special records be kept by DIs showing disposition of such proceeds at any given time. Therefore, § 203(b) requires DIs to identify separately each long-term foreign borrowing and to record each separate use of the proceeds. The term "use" refers not only to actual investments, but also to deductions taken under § 203(d), § 313(d)(1) or § 306(e). For example, proceeds loaned by a DI to an AFN in Schedule C will occasion a deduction from net transfer of capital to Schedule C under § 313(d)(1), and the proceeds will actually be invested in the Schedule C AFN. However, if the Schedule C AFN repays the loan and the DI does not thereafter allocate the returned proceeds under § 203(d)(2), the Schedule C deduction will remain in effect until repayment of the underlying long-term foreign borrowing. Upon such repayment, a § 312(a)(7) transfer of capital to Schedule C would have to be reflected. Similarly, proceeds allocated to and deducted from positive direct investment in any scheduled area pursuant to § 306(e) may actually be invested in bonds of a U.S. corporation, or expended in making a transfer of capital to an AFN. Accordingly, the DI must identify actual investment of proceeds, as well as record direct investment deductions taken with respect to such proceeds.

Example 51. During 1969, the international finance subsidiary of a U.S. corporation (DI) sells $25 million face amount of debentures convertible into DI's common stock in a form that qualifies the issue as a long-term foreign borrowing. (a) DI sells the debentures at a discount of $1,250,000 and pays the underwriters commissions of $1,250,000, receiving $22,500,000 net from the sale. (b) DI immediately expends $10 million of the proceeds received to acquire a French corporation (C), which then becomes a Schedule C AFN. (c) DI deposits the remaining proceeds of the borrowing ($12,500,000) in a demand account with a London bank. (d) At the end of 1969, DI allocates $3 million of these available proceeds to positive direct investment in Schedule B. (e) In 1970, DI loans $5 million of the funds deposited in the London bank to C. (f) Subsequently, in 1970, $2 million face amount of debentures are converted. (g) At the end of 1970, DI allocates $2,500,000 of available proceeds to positive direct investment in Schedule B.

The above transactions should be recorded on the books and records required by § 203(b) in the following manner:

With respect to transaction (a), DI enters proceeds of a long-term foreign borrowing in the amount of $25 million.

With respect to transaction (b), DI enters an expenditure of $10 million in connection with the transfer of capital incident to acquisition of C (§ 312(a)), and a deduction from net transfer of capital with respect to Schedule C (§ 313(d)(1)). After these entries, DI's records will reflect $15 million available proceeds and $10 million expended proceeds

(the latter being held in the form of C's stock).

With respect to transaction (c), DI enters the demand deposit of $12,500,000 available proceeds in the London bank; these proceeds are now held in the form of liquid foreign balances. (Note that available proceeds are exempted from the repatriation requirement of § 203(c).) DI does not transfer U.S. funds abroad, as might have been done, to augment liquid foreign balances up to the full $15 million available proceeds (see § 324(c)). Accordingly, DI would reflect $2,500,000 (the amount of discount and commissions) of available proceeds as being held in the United States.

With respect to transaction (d), the $3 million allocation to Schedule B, DI may use the foregoing $2,500,000 available proceeds deemed held in the United States. Accordingly, only $500,000 need be allocated out of available proceeds held as liquid foreign balances. This $500,000 must be withdrawn from the London bank and repatriated to the United States (§ 306(e)); DI does so, investing the $500,000 in bonds of a U.S. corporation. The allocation, the source of available proceeds used, and the repatriation transaction would be reflected in DI's books and records pursuant to § 203(b).

Accordingly, at the end of 1969, DI has recorded a long-term foreign borrowing, the proceeds of which are $25 million. Of such proceeds, $10 million have been expended, with a deduction in Schedule C, and are held in the form of stock of C; $2,500,000 relate to the discount and commission, are treated as being held in the United States and are allocated, with the deduction in Schedule B; $500,000 are held in the form of bonds of a U.S. corporation and are allocated, with the deduction in Schedule B; and $12 million are held on deposit in the London bank and are available proceeds.

With respect to transaction (e), DI enters an expenditure of $5 million available proceeds to C. Available proceeds in the London bank are decreased by such amount, and DI now has another $5 million deduction in Schedule C under § 313(d)(1), the expended proceeds being held in the form of a debt obligation of C.

With respect to transaction (f), DI is permitted to treat the repayment by conversion of the debentures either as a reduction of available proceeds or as a transfer of capital. DI elects to recognize a transfer of capital. Since total expended and allocated proceeds at the time of conversion are $18 million, with $15 million expended in Schedule C and $3 million allocated to Schedule B, ⅚ of $2 million ($1,667,000) is a transfer of capital to Schedule C and ⅙ of $2 million ($333,000) is a transfer of capital to Schedule B. Simultaneously, proceeds expended in C and allocated to B are reduced in an equal amount. Accordingly, DI treats the proceeds held in the form of debt obligation of C as reduced by $1,667,000, and DI treats allocated proceeds held in the form of corporate bonds as having been reduced by $333,000.

With respect to transaction (g), the allocation of $2,500,000 to Schedule B is entered by DI. The deposit in the London bank is shown as reduced by $2,500,000. Since DI must repatriate these allocated proceeds, the funds are deposited in a New York bank. Accordingly, DI would enter such deposit on its records also.

At the end of 1970, DI has $23 million proceeds of long-term foreign borrowing ($25 million less $2 million repayment). Of such proceeds, $4,500,000 are still available and are held on deposit in the London bank; $2,500,000 (comprising the discount and commission) are allocated to Schedule B and are treated as held in the United States; $167,000 are allocated to Schedule B and are held in the form of U.S. corporate bonds; $2,500,000 are allocated to Schedule B and are held on deposit with a New York bank; and $10 million are expended in C and held in the form of equity securities of C; and $3,333,000 are expended in C and held in the form of debt obligations of C.

§ B324–13 Borrowings denominated in a foreign currency.

Proceeds of foreign borrowing or long-term foreign borrowing denominated in a foreign currency are valued at the U.S. dollar equivalent prevailing when the borrowing was made, regardless of subsequent exchange rate fluctuations, until the time of repayment or refinancing. A refinancing as described in § 324(b)(1) shall be treated at the U.S. dollar equivalent as of the time of such refinancing.

Example 52. On August 1, 1969, DI made long-term foreign borrowing in a foreign currency valued at $1 million on that date. DI allocated the proceeds under § 306(e) to positive direct investment in Schedule C. In early 1970, the currency involved was revalued by 10 percent. In October 1970, DI repays the borrowing. Although the dollar equivalent of the repayment is $1,100,000, DI is charged with a § 312(a)(7) transfer of capital to Schedule C of only $1 million, the dollar equivalent on the date of the borrowing. The transfer of capital upon repayment would have been in the same amount if, instead, the currency had been devalued.

Example 53. On June 1, 1970, DI makes a 6-month borrowing from a foreign bank (X) denominated in a foreign currency. The dollar equivalent is $2 million. In September 1970, the currency is devalued by 10 percent. On December 1, 1970, DI repays X in full and plans to refinance by borrowing from foreign bank (Y) in the same currency. In order to preserve $2 million of proceeds, DI must borrow additional units of the foreign currency so that the dollar equivalent thereof on December 1 will equal $2 million. If, however, the currency had been revalued, DI would have needed to borrow only $2 million worth of the currency at the rate prevailing on December 1.

B502—Election of Allowables

Section 502 requires a DI to elect for each year one of the following allowables: (a) The § 503 minimum allowable of $1 million; (b) the § 504(a) historical allowable; (c) the § 504(b) earnings allowable; or (d) the § 507 alternative minimum and Schedule A supplemental allowable.

The election of allowables must be made on Form FDI–102F or Form FDI–102F/S (Annual Report) filed for the year with respect to which the election is made. Therefore, DIs will not be obliged to make a binding election for 1970 until the due date of the 1970 annual report (Apr. 30, 1971, unless hereafter modified).

As provided by § 502 (c) and (d), a DI may not elect § 503 in 1 year, starting in 1970, and § 507 in the next year, or vice versa, without obtaining prior written permission from OFDI.

An incremental earnings allowable under § 506 is available in addition to the allowable elected pursuant to § 502.

In the event of a merger between two or more DIs during a year, the resulting entity will be regarded as having been a single DI for the entire year in question, as well as for base-period years. Merger during a year of two DIs will not result in combination for such year of § 503 or § 507 allowables with respect to the surviving DI.

Note that the special allowable provided in § 1302 of Subpart M for U.S.-flag air carriers is applicable only if a § 504 allowable is elected pursuant to § 502.

B503—Worldwide Minimum Allowable

§ B503–1 Introduction.

Section 503 in effect for 1970 allows any DI electing (under § 502) to be governed by the provision of § 503 to make positive direct investment not exceeding an aggregate of $1 million in all scheduled areas.

§ B503–2 Summary.

The § 503 minimum allowable of $1 million applies worldwide, as opposed to the schedular allowables provided in §§ 504 and 507.

Election of § 503 in any year operates to eliminate allowables otherwise available during such year under § 504 (including carryforwards from prior years) and to eliminate carryforwards into succeeding years, except for the § 506 incremental earnings allowable.

A DI having positive direct investment of $200,000 or less during 1968 under former § 503 and not electing § 503 thereafter may carry forward the amount of 1968 § 504 allowables, reduced by the amount of positive direct investment actually made in each scheduled area during 1968.

Since the beginning of the program in 1968, § 503 has been liberalized in several respects. In 1968, the § 503 allowable was $200,000 and applied on a schedular basis. In 1969 the allowable was increased to $1 million and the schedular limitations were eliminated. Also in 1968 and 1969, § 503(b) required DIs to exclude certain losses of its AFNs in calculating direct investment under § 503. In 1968, the exclusion applied to negative reinvested earnings of incorporated AFNs in Schedule C, and in 1969, to aggregate annual losses of both incorporated and unincorporated AFNs in all scheduled areas. Section 503(b) was revoked for 1970 and subsequent years. (See § B503–3(ii).)

§ B503–3 Calculation of direct investment under § 503.

(i) *Worldwide basis.* Section 503(a) provides that positive direct investment is authorized on a worldwide basis up to $1 million, in contrast to the schedular limitations imposed by § 504.

Example 1. DI has a wholly owned incorporated AFN (B) in the United Kingdom and a wholly owned incorporated AFN (A) in Argentina. During 1970, B has a loss of $500,000, and A has earnings of $1,500,000 all of which are reinvested. There are no other earnings, resulting in worldwide positive direct investment made by DI during 1970 of $1 million, which is authorized by § 503(a).

Example 2. DI has three AFNs: A, a corporation in Brazil; B, a corporation in Australia; and C, a branch in Germany. During 1970, DI makes a positive transfer of capital of $700,000 to A and a negative transfer of capital of $400,000 to B. C earns $500,000, none of which is remitted, so that its net assets increase by $500,000. A has losses of $300,000, and B earns $500,000 and pays no dividends. Positive direct investment in all scheduled areas for 1970 is $1 million which is authorized by § 503(a), as shown by the following table ($000 omitted):

	Amount by scheduled area			
	A	B	C	Total
Net transfer of capital	700	(400)	500	800
Reinvested earnings	(300)	500	0	200
Positive direct investment	400	100	500	1,000

As illustrated by Examples 1 and 2 above, all of the positive and negative components of direct investment are taken into consideration without regard to the scheduled area of the particular transactions. In addition, dividends, remittances of branch profits and transfers of capital between AFNs in different scheduled areas (except between Canadian and non-Canadian AFNs) will "net out." Any number of such interschedular transactions may take place without affecting the amount of direct investment for purposes of the regulations.

Example 3. DI has two AFNs: B, a corporation in Schedule B, and C, a corporation in Schedule C. During 1970 DI transfers $1 million to C, and B transfers $2 million to C. Under § 505(a)(3) the transfer from B to C is treated as a transfer of capital from B to DI of $2 million and a transfer of capital from DI to C of $2 million. DI has made positive direct investment of $1 million in all scheduled areas under § 503 (000 omitted):

Net transfer of capital	
To Schedule C	$3,000
To Schedule B	(2,000)
Positive direct investment	
In Schedule C	$3,000
In Schedule B	(2,000)
Total	1,000

(ii) *Treatment of aggregate annual losses in 1969.* Section 503(b) as in effect for 1969 provided that in calculating direct investment made under § 503 aggregate annual losses of incorporated and unincorporated AFNs were to be disregarded. This provision was an exception to the general rule, set forth in § 306, that direct investment is the sum of net transfer of capital and the DI's share of reinvested earnings. Section 503(b) has been revoked for 1970 and subsequent years. Accordingly, DIs that elect the § 503 allowable for 1970 will compute direct investment in the manner specified in § 306. However, the revocation of § 503(b) is not retroactive, and DIs should not recalculate their § 503 direct investment for 1969.

The term "aggregate annual losses" as used in former § 503(b) meant the sum, if negative, of the earnings and losses of all of the DI's incorporated and unincorporated AFNs for the year in question. To "disregard" aggregate annual losses meant that in calculating worldwide direct investment under § 503 the DI was required to add to direct investment as computed under § 306 the amount of such aggregate annual losses. (For a more detailed analysis of former § 503(b) see 1969 General Bulletin § B503–3(ii).)

The following example illustrates how aggregate annual losses were treated in calculating 1969 direct investment under former § 503(b):

Example 4. DI has two wholly owned incorporated AFNs (X and Z). X has a wholly owned subsidiary (Y) in a different scheduled area, and Z has a branch (W) in a different scheduled area. The following takes place during 1969: X has earnings (excluding dividends received from Y) of $2 million and pays a dividend to DI of $1,500,000 (before withholding taxes); Y has losses of $3 million but pays a dividend to X of $250,000 (before withholding taxes); DI makes a positive transfer of capital of $2,500,000 to Z; and W earns $500,000, all of which is remitted to Z, and there is no change in W's net asset position. To compute direct investment under § 503, direct investment under § 306 is first computed (000 omitted):

(a) Net transfer of capital to Z	$2,500
(b) Net transfer of capital to W	0
(c) Reinvested earnings of X [$2,000 − ($1,500 − $250)]	750
(d) Reinvested earnings of Y [−$3,000 − ($250)]	(3,250)
(e) Reinvested earnings of Z [0 − (−$500)]	500
(f) Direct investment under § 306	500

Next "aggregate annual losses" are computed (000 omitted):

(g) Earnings of X	$2,000
(h) Losses of Y	(3,000)
(i) Net earnings of W	500
(j) Aggregate annual losses	500
Direct investment for purposes of § 503 (line (f) plus line (j))	1,000

Thus, positive direct investment under § 503 is $1 million, the sum of direct investment under § 306 of $500 [thousand] and aggregate annual losses of $500 [thousand], as calculated above.

(iii) *Canadian AFNs.* As a result of §§ 1103 and 1104 of Subpart K, direct investment in Canadian AFNs is not included in calculating direct investment for purposes of § 503. Accordingly, dividend distributions, profit remissions, and transfers of capital between Canadian and non-Canadian AFNs will not net out under § 503. For example, if a Canadian AFN transfers funds or other property to a non-Canadian AFN, the DI will be deemed to have made such transfer if the conditions of § 505 are met. Because of § 1103, the transfer deemed to have been made by the Canadian AFN to the DI (under § 505) will not offset the corresponding transfer deemed made by the DI to the non-Canadian AFN.

§ B503–4 Carryforwards.

Unused § 503 allowables may not be carried forward to succeeding years. In addition, § 503(c) provides that the election of § 503 eliminates all existing § 504 and § 1302 allowables as of the year of electing § 503, including historical and earnings allowables for such year, carryforwards from prior years and carryforwards into succeeding years.

Example 5. In 1969, DI has allowables under § 504 of $50,000 in Schedule C, $500,000 in Schedule B, and $200,000 in Schedule A. A portion of the allowables in Schedules A and B are carryforwards of § 504 allowables not used in 1968. In 1969, DI, in order to make positive direct investment in Schedule C in excess of its § 504 allowable of $50,000, elects § 503 and makes worldwide positive direct investment of $600,000. As a result of this election, the DI permanently loses the § 504 schedular allowables carried forward from 1968, and the unused portion of the 1969 § 503 allowable may not be carried forward into subsequent years.

Section 504 as in effect during 1968 permitted a DI to carry forward any unused portion of the schedular allowables authorized by that section. Present § 504(f) preserves that carryforward for use in 1969 and succeeding years. However, to make clear that positive direct investment authorized by § 503 in 1968 must be taken into account in calculating the amount of such § 504 carryforward, § 503(d) provides that if a DI elects to be governed by § 504 in 1969 and succeeding years, the § 504 allowables carried forward from 1968 must be reduced by the amount of positive direct investment actually made in 1968. The reduction is made first in the scheduled area where the positive direct investment was made under § 503 in 1968 and then in the remaining scheduled areas in the following order: C–B–A.

Example 6. In 1968, DI had allowables under § 504 of $50,000 in Schedule C, $50,000 in Schedule B, and $200,000 in Schedule A. During 1968, DI made positive direct investment of $100,000 in Schedule C and $50,000 in Schedule B under § 503 as then in effect. DI also made negative direct investment of $50,000 in Schedule A, which, under § 504(f), may be carried forward to succeeding years together with any other unused Schedule A allowable. While the investment in Schedule C was not authorized under §504, DI's overall positive direct investment in 1968 was authorized under § 503, since positive direct investment in each scheduled area, when added together, was $200,000 or less (in this case, $150,000), and positive direct investment in any one scheduled area did not exceed $200,000. If DI does not elect the § 503 minimum allowable for 1969, DI will carry forward to 1969 § 504 allowables not used in 1968 of $200,000, after the reductions provided for in § 503(d), distributed in the scheduled areas as follows: Zero in Schedule C, zero in Schedule B, and $200,000 in Schedule A. The carryforward of $200,000 is in addition to any earnings allowables or historical allowables which DI may have for 1969 under § 504. The above calculations are set forth in tabular form as follows (000 omitted):

	Amount by scheduled area		
	C	B	A
1968 § 504 allowables	$50	$50	$200
Direct investment under § 503 in 1968	100	50	(50)
Reductions to 1968 § 504 allowables under § 503(d)	50	50	50
§ 504 carryforwards to 1969	0	0	200

If DI elects to make positive direct investment in 1969 under § 503, DI will lose the foregoing $200,000 carryforward in Schedule A for 1969 and succeeding years, by reason of § 503(c).

Assume that DI elected the § 504 allowables in 1969, but did not make any positive direct investment in Schedule A, and again elected the § 504 allowables in 1970. In such a case, DI would carryforward to 1970 all of its unused 1969 § 504 allowables, including the $200,000 in Schedule A that was originally carried forward to 1969 from 1968. However, if DI in 1970 elected either the § 503 or § 507 allowables, it would lose all carryforwards from previous years.

§ B503–5 Related provisions.

(i) *Available proceeds.* Section 203(d) (1) exempts DIs electing § 503 (or § 507) from the restrictions otherwise applicable to positive net transfers of capital while holding available proceeds of long-term foreign borrowing in the form of foreign property.

(ii) *Associated groups and persons owning interests in DIs.* Section 905(b) (2) (i) and (iii) limit the use of § 503 by members of an associated group with respect to a group AFN, and § 906(b) (3) (ii) and (iv) limit the use of § 503 by owners of a principal DI making an election under § 906(b) (1).

(iii) *Quarterly reports.* Starting in 1970 a DI may be exempt from filing a quarterly report on Form FDI–102, if, among other requirements, the DI has not made direct investment (whether positive or negative) during the year in excess of $1 million. For this purpose, direct investment in Canada must be included and no deduction will be made for proceeds of long-term foreign borrowing expended in transfers of capital to AFNs, even though deducted under § 313(d) (1) for purposes of determining compliance under § 201(a), or allocated to positive direct investment, even though deducted under § 306(e) for purposes of determining compliance under § 201(a). (See General Instruction B, including examples, of Instructions for Completing the 1970 Cumulative Quarterly and Annual Report Form FDI–102/102F, Revised June 1970.)

(iv) *Apportionment of borrowing deduction.* DIs electing § 504 or § 507 for 1970 should see § 306(e) (3) and § B306–7 if they contemplate repayment or reallocation of borrowings deducted from § 503 worldwide positive direct investment under § 306(e) in 1969.

B504—Schedular and Carryforward Allowables

§ B504–1 Introduction.

Section 504 provides alternative allowables applicable to direct investment in each of the three geographical schedules: An historical allowable (§ 504 (a) and (c)) and an earnings allowable (§ 504(b)). A DI may elect to be governed by either of these § 504 allowables as an alternative to the §§ 503 and 507 allowables.

Unlimited "downstream" utilization of § 504 (a) or (b) allowables is permitted (i.e., from Schedule C to Schedules B and A, and from Schedule B to Schedule A). Provision is also made for "upstream" adjustment of allowables under certain circumstances. Carryforward of unused allowables into succeeding years is also permitted, so long as the DI continues electing to be governed by § 504.

§ B504–2 Summary.

A DI electing to be governed by § 504(a) for 1970 and succeeding years may make positive direct investment in Schedules A, B, and C based on a percentage of average annual direct investment in those areas during 1965–66, viz., 110 percent in Schedule A, 65 percent in Schedule B and 35 percent in Schedule C. (The method for computing the Schedule C historical allowable was amended for 1970 and subsequent years to eliminate the reinvestment ratio alternative. See § B504–3.)

Section 504(c) (1) and (2) provide that the § 504(a) historical allowable in Schedule C may be increased if such allowable is less than 30 percent of DI's annual earnings in that scheduled area during the preceding year. The amount of authorized increase will be equal to the full amount of the difference between such 30-percent earnings figure and the basic historical allowable for Schedule C determined under § 504(a) (3), if the sum of the § 504(a) historical allowables in Schedules A and B are sufficiently large. The historical allowable in Schedule A and, if necessary, in Schedule B must be charged with such authorized increase. An "upstream" adjustment for the Schedule B allowable is also authorized by § 504(c) (3) in the same circumstances, to the extent there remains (after increasing the Schedule C historical allowable) any of the Schedule A historical allowable against which such increase can be charged.

A DI electing the § 504(b) earnings allowable is permitted to make positive direct investment in each scheduled area not exceeding 30 percent of "annual earnings" (defined in § 504(b) (4)) for the immediately preceding year in the respective scheduled area.

All or any part of the allowables computed pursuant to § 504 (a) and (c) or § 504(b) may be used "downstream"; i.e., the Schedule C allowable may be used in Schedule B or A instead of Schedule C and the Schedule B allowable may be used in Schedule A instead of Schedule B. A DI may carry forward into succeeding years any portion of a schedular allowable not used during the year. Negative direct investment for a year in any scheduled area may be carried forward and may be used to authorize additional positive direct investment in other areas "downstream" in the same or subsequent years. However, in any year for which a DI elects to be governed by the § 503 or § 507 allowable, all accrued carryforward of § 504 allowables will be permanently lost (see §§ 503(c) and 507(c)).

In calculating direct investment in Schedule C for purposes of measuring use of the § 504 allowable elected by a DI, losses of Schedule C incorporated AFNs must be excluded. Such losses may, however, be carried forward to subsequent years to authorize additional reinvestment of earnings of incorporated AFNs in Schedule C.

Carryforwards authorized in 1968 under § 504 as in effect for that year may be used in the same or downstream scheduled areas in 1969 and succeeding years, with the exception that losses of Schedule C AFNs during 1968 may be carried forward only to authorize additional reinvested earnings in Schedule C (§ 504(f)).

§ B504–3 Calculation of historical allowables under § 504(a).

Section 504(a) authorizes annual positive direct investment in Schedule A in an amount equal to 110 percent of a DI's average annual direct investment in that scheduled area during 1965 and 1966, in Schedule B in an amount equal to 65 percent of a DI's average annual direct investment in that scheduled area during 1965 and 1966, and in Schedule C in an amount equal to 35 percent of a DI's average annual direct investment in that scheduled area during 1965 and 1966. The following examples illustrate calculation of historical allowables for Schedule A under § 504(a) (1), Schedule B under § 504(a) (2) and Schedule C under § 504 (a) (3):

Example 1. DI made positive direct investment in Schedule A in 1965 of $3 million and in 1966 of $1 million. Average annual direct investment in Schedule A for 1965–66 is $2 million ($3 million plus $1 million divided by 2). The amount of annual positive direct investment authorized under § 504(a) (1) is $2,200,000 (110 percent of $2 million). If Schedule B rather than Schedule A were involved, § 504(a) (2) would authorize $1,300,000 of annual positive direct investment (65 percent of $2 million). If Schedule C, instead, were involved, § 504(a) (3) would authorize $700,000 of annual positive direct investment (35 percent of $2 million).

Example 2. DI made positive direct investment in Schedule A during 1965 of $1 million and negative direct investment in 1966 of $500,000. Average annual direct investment in Schedule A was, therefore, $250,000. DI made positive direct investment of $1 million in Schedule B during 1965 and negative direct investment of $2 million in 1966. Thus, annual average investment in Schedule B was a negative amount (i.e., minus $500,000), treated as zero for purposes of calculating the historical allowable under § 504 (a). DI made positive direct investment in Schedule C during 1965 of $800,000 and direct investment in 1966 of zero. Average annual direct investment in Schedule C was therefore $400,000. Accordingly, DI's historical allowable for Schedule A is $275,000; for Schedule B, it is zero; for Schedule C, it is $140,000. (These are DI's basic historical allowables, and the Schedules B and C allowables are subject to upward adjustment by "borrowing" from the Schedule A allowable if the conditions specified in § 504(c) are satisfied. See § B504–4(ii).)

Prior to its amendment in 1970, § 504 (a)(3) provided that the historical allowable for Schedule C was to be calculated differently than for Schedules A and B. Under former § 504(a)(3), the Schedule C historical allowable was the lesser of (a) 35 percent of the DI's average annual direct investment in 1965–66 in Schedule C or (b) the DI's share of the current year's earnings of incorporated AFNs in Schedule C multiplied by the percentage of total earnings of such AFNs that were reinvested during 1964–66. (See 1969 General Bulletin § B504-3(ii).) Under former § 503(a)(3) many DI's had a zero Schedule C allowable despite having made substantial direct investment in Schedule C during 1965–66. The elimination of the reinvestment ratio calculation in 1970 should benefit many DI's.

§ B504-4 Calculation of § 504(b) earnings allowables and § 504(c) adjustment to § 504(a) historical allowables.

The § 504(b) earnings allowable is intended to benefit DIs with small or no historical allowables under § 504(a), and the § 504(c) "upstream adjustment" to § 504(a) historical allowables is intended principally to aid DIs with small or no historical allowables in Schedule C. Either the earnings allowable or the upstream adjustment may be advantageous when 30 percent of earnings for the year immediately preceding the year of electing either the § 504 historical or earnings allowable exceeds a DI's historical allowables.

Accordingly, a DI with no Schedule C historical allowable may, nevertheless, be authorized to make positive direct investment in that scheduled area based on Schedule C earnings during the preceding year. Election of the earnings allowable under § 504(b), however, requires its use in all scheduled areas. Where historical allowables in Schedules A and B are substantial, it may not be to a DI's advantage to elect § 504(b) because the historical allowables in Schedules A and B could not then be utilized. Under these circumstances, the DI may benefit from the "upstream adjustment" to historical allowables provided by § 504(c), whereby the historical allowables can be shifted "upstream" to Schedule C from Schedules A and B.

(i) *Section 504(b): 30 percent earnings allowables.* A DI may elect, under § 502(a)(3), to be governed by the allowable provided in § 504(b), authorizing positive direct investment in each scheduled area equal to 30 percent of the DI's share of AFN earnings in such area during the immediately preceding year.

The earnings allowable is computed on the basis of a DI's annual earnings in a scheduled area, defined in § 504(b)(4) as the DI's share of "total earnings or total losses" of all incorporated AFNs in such scheduled area (determined as provided in § 306(c)) plus the DI's share of "net earnings or losses" of all unincorporated AFNs during the year in such scheduled area. Earnings or losses of Canadian affiliates are excluded from this computation.

Example 3. DI's 1969 share of AFN annual earnings is $10 million in Schedule C and $15 million in Schedule A. DI's Schedule B AFNs incurred losses during 1969 of $2 million. Schedule B "annual earnings" in 1969 are, therefore, a negative $2 million. If DI elects the 30 percent earnings allowable for 1970 under § 502(a)(3), allowables under § 504(b) will be $3 million in Schedule C (30 percent of $10 million), zero in Schedule B (since DI had losses in Schedule B in 1969), and $4,500,000 in Schedule A (30 percent of $15 million).

(ii) *Section 504(c): "Upstream" use of allowables.* A DI electing under § 502 (a)(2) to be governed by the schedular § 504(a) historical allowables obtains the benefit of an "upstream" adjustment of such allowables as required by § 504(c). Section 504(c)(1) and (2) automatically increase the Schedule C allowable if 30 percent of DI's annual earnings in Schedule C in the preceding year exceed the § 504(a) historical allowable in that scheduled area for the current year and if there are historical allowables in Schedules A and/or B. Section 504(c)(3) will operate in a corresponding manner to increase the Schedule B allowable, if any Schedule A historical allowable remains after the § 504(c)(1) adjustment.

The upstream adjustment is the lesser of (a) the excess of 30 percent of the preceding year's annual earnings in the upstream scheduled area over the historical allowable for that area, or (b) the aggregate amount of the historical allowables in the downstream schedules.

Although the "upstream" adjustment is automatic, § 504(d)(2) and (3) permits a DI to utilize allowables for positive direct investment in a "downstream" schedule.

Unused allowables carried forward from 1968 pursuant to § 504(f), or carried forward from 1969 or later years pursuant to § 504(d), are not available for adjustment upstream; only a current year's historical allowable calculated under § 504(a) may be used for this purpose. On the other hand, the additional allowables in Schedules B and C resulting from an upstream adjustment may themselves be carried forward into succeeding years.

Example 4. In 1969, DI has § 504(a) historical allowables in each of the scheduled areas as shown on line (1) of the table below. DI also has a carryforward of unused allowables from 1968 in Schedule A of $1 million (line (2) below). In 1968 DI's share of annual earnings of AFNs in each scheduled area was as shown on line (3) below. If DI elects, pursuant to § 502(a)(2), to be governed by § 504(a) for 1969, DI's historical allowables under § 504(a) are adjusted pursuant to § 504(c), thereby increasing the Schedule C allowable by $2 million. Of this amount $1,500,000 is moved upstream from Schedule A and $500,000 is upstreamed from Schedule B, with corresponding reductions in the historical allowables for those schedules, as shown below (000 omitted):

Item	Amount by scheduled area			
	C	B	A	Total
(1) § 504(a) historical allowables	$1,000	$2,500	$1,500	$5,000
(2) § 504(f) carryforward allowable from 1968	0	0	1,000	1,000
(3) 1968 annual earnings	10,000	4,000	2,000	16,000
(4) 30 percent of line (3)	3,000	1,200	600	4,800
(5) 1969 § 504(a) historical allowables after § 504(c) "upstream" adjustments	3,000	2,000	0	5,000

Presumably, DI will elect to use the adjusted historical allowables rather than the 30 percent earnings allowable under § 504 (b), since (1) total historical allowables ($5 million) available under § 504(a) exceed total earnings allowables ($4,800,000) available under § 504(b); (2) the Schedule C allowable is as great and the Schedule B allowable greater under § 504(a) than under § 504(b); and (3) under § 504(d), DI may use any portion of the Schedule C adjusted historical allowable downstream in Schedule B or A, and any portion of the Schedule B allowable in Schedule A. While no part of the $1 million carryforward in Schedule A from 1968 can be adjusted upstream, DI may use that as an additional allowable in Schedule A.

Since DI has an unadjusted historical allowable in Schedule C of $1 million, the amount moved to Schedule C from Schedules A and B is $2 million, i.e., the difference between 30 percent of 1968 earnings in Schedule C and the historical allowable in Schedule C. Note, however, that if the aggregate historical allowables for Schedules A and B had been less than $2 million, the Schedule C allowable could have been increased only by such lesser amount of aggregate historical allowables for Schedules A and B. The total adjusted historical allowable of $3 million in Schedule C can be used in Schedules C, B, or A in 1969 or in succeeding years in the same manner as is generally permitted for § 504 allowables in Schedule C.

Example 5. In 1969, DI has § 504(a) historical allowables in each scheduled area as shown in line (1), and DI's share of annual earnings in 1968 is as shown in line (2) of the table below (000 omitted):

Item	Amount by scheduled area			
	C	B	A	Total
(1) § 504(a) historical allowables	$500	$2,000	$4,000	$6,500
(2) 1968 annual earnings	10,000	8,000	10,000	28,000
(3) 30 percent of line (2)	3,000	2,400	3,000	8,400
(4) 1969 § 504(a) historical allowables after § 504(c) upstream adjustments	3,000	2,400	1,100	6,500

Presumably, DI will elect to be governed by the 30 percent earnings allowable provided in § 504(b), since total allowables available to DI under the 30 percent earnings allowable ($8,400,000) exceed total historical allowables ($6,500,000 under § 504 (a) and (c)) and since the § 504(b) allowables in each scheduled area are as great or greater than in each schedule under § 504(b). The 30 percent earnings allowables are divided among the scheduled areas to reflect DI's share of 1968 annual earnings in each schedule. Whichever category of allowable is elected, DI may use such allowables "downstream" under § 504(d). For example, all allowables could be used in Schedule A.

Example 6. DI has no historical allowables under § 504(a). In 1968, DI had earnings in each scheduled area as shown in line (2) of the table below (000 omitted):

Item	Amount by scheduled area			
	C	B	A	Total
(1) § 504(a) historical allowables	0	0	0	0
(2) 1968 annual earnings	$10,000	$6,000	$1,000	$17,000
(3) 30 percent of line (2)	3,000	1,800	300	5,100
(4) 1969 § 504(a) historical allowable after § 504(c) upstream adjustments	0	0	0	0

Presumably, DI will elect under § 502(a)(3) to compute its 1969 allowables based on the 30 percent earnings allowable under § 504(b). Section 504 (a) and (c) would not be elected, since DI has no historical allowables. During 1969, however, DI may make positive direct investment in Schedule B or Schedule A in excess of the amounts indicated in line (3) above, by virtue of the "downstream" provisions of § 504(d). In other words, DI may carry down all or part of the Schedule B earnings allowable to Schedule A under § 504(d)(2), and all or part of the Schedule C earnings allowable to Schedule B or A under § 504(d)(3).

§ B504–5 Transfer or carryforward of schedular allowables.

Section 504(d) provides that the unused portion, if any, of the historical or earnings allowables provided in § 504 may be utilized in the same scheduled area in succeeding years to authorize positive direct investment in addition to that otherwise permitted, or may be used in other scheduled areas "downstream" in the same or succeeding years.

Schedule C allowables, to the extent unused in that area during the year, may be used in Schedules A and B in the same year or in Schedules C, B, and A in succeeding years. An unused allowable in Schedule B may be used in Schedule A in the current year or in Schedules B and A in succeeding years. An unused allowable in Schedule A may be used only in Schedule A in succeeding years.

The effect of the downstream and carryforward provisions is that, in addition to the amounts authorized by the basic historical or earnings allowable elected, a DI may make positive direct investment in each scheduled area up to the amount of any allowables that were available but unused in such area in prior years and that were available but unused in upstream areas in the same and prior years.

Both the historical allowable of § 504 (a) and (c) and the earnings allowable of § 504(b) can be used downstream or carried forward. The amount that may be carried forward is the excess of authorized positive direct investment over direct investment actually made during a given year, whether positive or negative. If no positive direct investment is authorized but negative direct investment is made, then the amount of such negative direct investment may be used downstream or carried forward.

(i) *Schedule A carryforward.* The following examples illustrate § 504(d)(1), governing the carryforward of unused Schedule A allowables:

Example 7. DI elects the historical allowable for 1969. Under § 504(a)(1), the Schedule A allowable is $5 million, but DI makes positive direct investment of only $2 million. Under § 504(d)(1), DI may carry forward the $3 million difference as an additional Schedule A allowable for use in succeeding years. If the historical allowable is elected again in 1970, DI may make positive direct investment of $8 million, consisting of the $5 million authorized by § 504(a)(1) and the $3 million authorized by § 504(d)(1).

Example 8. DI elects the historical allowable for 1969. Under § 504(a)(1), DI has a zero allowable in Schedule A. In 1969, DI's sole incorporated AFN in Schedule A has earnings of $5 million, pays DI a dividend of $5 million, and transfers $5 million to DI. For 1969, DI has negative direct investment of $5 million in Schedule A. Under § 504(d)(1), this may be used to offset a corresponding amount of positive direct investment in Schedule A in succeeding years.

In 1970, DI elects the 30 percent earnings allowable under § 504(b). Authorized positive direct investment in Schedule A in 1970 will be $6,500,000: $1,500,000 (30 percent of 1969 total earnings) plus $5 million carryforward under § 504(d)(1).

If DI's historical allowable had been $1 million in Schedule A, the carryforward allowable would have been $6 million (the sum of the historical allowable of $1 million and negative direct investment of $5 million).

If a DI had unused allowables in Schedule A in 1968, former § 504(b)(1) in effect for 1968 authorized their carryforward into 1969 and succeeding years. Present § 504(f)(1) specifically preserves these carryforwards.

(ii) *Schedule B downstream or carryforward.* Unused historical or earnings allowables in Schedule B may be carried forward in the same manner as those in Schedule A, as provided by § 504(d)(2). The unused Schedule B allowables may also be used downstream in Schedule A in the same or succeeding years. Under former § 504(b)(2), unused 1968 Schedule B allowables authorized additional positive direct investment in Schedules B and/or A in 1969 and succeeding years. Present § 504(f)(2) specifically preserves these carryforwards.

Example 9. DI's Schedule B historical allowable is $1 million. Positive direct investment of $500,000 is made during 1968 in that schedule.

In 1969, DI elects the historical allowable and may make positive direct investment in Schedule B of $1,500,000, consisting of the $1 million historical allowable under § 504 (a)(2) plus the $500,000 carryforward from 1968 under § 504(f)(2). All or any part of this $1,500,000 not used in Schedule B during 1969 may be used in Schedule A in 1969 or in Schedule B and/or A in succeeding years, under § 504(d)(2).

(iii) *Schedule C downstream or carryforward.* Unused allowables in Schedule C may be used downstream or carried forward, pursuant to § 504(d)(3).

Section 504(f)(3) preserves the Schedule C carryforwards authorized under former § 504 in effect for 1968 and increases the scope of their use. During 1968, § 504(c)(1) authorized carryforward of Schedule C allowables unused as a result of "excess dividends", and § 504 (c)(2) in effect for 1968 authorized carryforward unused as a result of negative net transfer of capital. Under present § 504(f)(3)(i), these 1968 carryforward allowables can be used by the DI to make positive direct investment in Schedules C, B, and/or A in 1969 and succeeding years in addition to that otherwise authorized.

"Total losses" of incorporated AFNs in Schedule C during 1968 may be carried forward to 1969 and succeeding years only as an authorization for additional reinvested earnings in Schedule C. See § 504(f)(3)(ii).

A DI that made direct investment under § 503 in 1968 and had unused § 504 allowables may carry forward such unused allowables to succeeding years subject to the conditions set forth in § 503 (d). See § B503–4.

§ B504–6 Total losses of incorporated AFNs in Schedule C.

Section 504(e) provides that total losses (as defined in § 306(c)) of incorporated AFNs in Schedule C must not be taken into account in calculating positive direct investment in that scheduled area under § 504. However, this requirement does not affect the computation of allowables under § 504(a)(3) or § 504(b); it is applicable only in calculating the amount of direct investment made during a year and the extent to which the given allowable for such year has been used up. The principal purpose of § 504 (e) is to prevent total losses of incorporated AFNs in Schedule C from being utilized in the current year or succeeding years to authorize transfers of capital to AFNs that result in positive direct investment in any scheduled area. Such losses may, however, be carried forward for use to authorize additional reinvested earnings of incorporated AFNs in Schedule C in subsequent years.

By operation of this section, total losses of incorporated Schedule C AFNs are, in effect assigned a value of zero for purposes of computing direct investment in Schedule C under § 306. Accordingly, the formula suggested in § B306–6(iii) for determining reinvested earnings pursuant to § 306(b) would, if total earnings are zero or a negative amount, be:

$$RE = O - [(DP + dp) - (dr + pr)].$$

Example 10. DI has both incorporated and unincorporated AFNs in Schedule C. In 1969 DI elects the earnings allowable under § 504(b). The § 504(b) earnings allowable for 1969 in Schedule C is $500,000.

The incorporated AFNs have losses of $200,000 and pay no dividends. The unincorporated AFNs have earnings of $600,000 and a net increase in assets of $600,000. At this point, DI has made positive direct investment of $600,000 because the $200,000 total losses are disregarded under § 504(e). In order to be in compliance for 1969, DI will have to reduce this positive direct investment by $100,000 through a negative transfer of capital or an offset using proceeds of long-term foreign borrowing. However, DI can carry the $200,000 loss forward into 1970 to authorize additional reinvested earnings of incorporated AFNs in Schedule C.

If the AFNs had been in Schedule A or B, positive direct investment would have been $400,000 ($600,000 net transfer of capital, plus

total losses (negative reinvested earnings) of $200,000).

Example 11. DI has only incorporated AFNs in Schedule C, that earn $500,000 in 1969 and pay dividends of $700,000 to the DI. Thus, total earnings are $500,000, while reinvested earnings are negative in the amount of $200,000. If there are no other relevant transactions during the year, DI will have made negative direct investment of $200,000. This can be used to authorize positive direct investment (positive transfers of capital or reinvested earnings) of up to $200,000 in Schedule C in subsequent years, or in Schedules A and B in the same and subsequent years (see § 504(d)(3)). (This example illustrates the difference between losses of incorporated AFNs in Schedule C and negative reinvested earnings of such AFNs in terms of permissible use as a carryforward into subsequent years.)

Example 12. DI has a wholly owned incorporated AFN (C) in Schedule C with a branch (A) in Schedule A. DI elects the § 504(b) earnings allowable for 1969, pursuant to which the Schedule C allowable is $700,000. A earns $1 million.

On December 30, 1969, it appears that C will have losses of $200,000. Nevertheless, A may remit no more than $700,000 to C. By operation of § 306(b), profits received by an incorporated AFN from a branch in another scheduled area are considered to be reinvested earnings of the parent. Therefore, if A remits $700,000 to C, net reinvested earnings (and DI's positive direct investment) would be only $500,000. However, in computing positive direct investment in Schedule C under § 306, C's losses must be excluded; in effect, they are treated as earnings of zero. Therefore, positive direct investment in Schedule C would be the full $700,000 permitted under the § 504(b) earnings allowable for 1969.

If the incorporated AFN had been in Schedule B, however, its branch could have remitted $900,000, since the restrictions imposed with regard to losses in calculating positive direct investment apply only to Schedule C.

§ B504–7 Related provisions.

Section 504 allowables will be reduced pursuant to § 1003 in the amount of repayment of borrowing authorized by § 1002. (See also § 312(a) (6) and (7).)

Section 203(d)(1) requires a DI to expend or allocate available proceeds of long-term foreign borrowing, other than available proceeds that have been repatriated to the United States, before the DI is permitted to make any net transfer of capital under § 504 that results in positive direct investment.

Section 312(c)(1) provides, in effect, that a DI acquiring an equity interest in an AFN from another DI must assume the 1965–66 direct investment experience of the divesting DI with respect to the AFN acquired. In addition, the acquiring DI is charged with direct investment made with respect to the AFN by the divesting DI during the year of acquisition.

See the discussion in § B1003–1 concerning the order in which allowables are reduced by repayment charges incurred incident to repayment of long-term foreign borrowings.

B505—Transfers of Capital Between Affiliated Foreign Nationals

§ B505–1 Introduction.

Section 505 is primarily concerned with the treatment of transactions between AFNs of a DI in calculating the DI's annual net transfer of capital to a given scheduled area under § 313. It should be emphasized that § 505 affects only the calculation of transfers of capital and net transfers of capital under §§ 312 and 313; it has no bearing on the calculation of a DI's share in reinvested earnings of incorporated AFNs under § 306.

§ B505–2 Summary.

As a general rule, a transfer of capital from an AFN in one scheduled area to an AFN in another scheduled area will result under § 505 in (a) a decrease in the DI's net transfer of capital to the scheduled area of the AFN making the transfer and (b) an equivalent increase in the net transfer of capital to the scheduled area of the AFN to which the transfer was made.

Transfers between AFNs are so treated only if at least one of the AFNs is an "affiliate" of the DI. (As defined in § 903(a), an "affiliate" is an entity in which the aggregate of direct interests held by the DI and any of its other affiliates exceeds 50 percent.) Transfers between AFNs will effectively "net out" under § 505, if both AFNs are located in the same scheduled area, or if the net transfer of capital is computed worldwide (such as for purposes of the § 503 minimum allowable), or on a combined schedular basis (such as for Schedules B and C under § 507).

Section 505 provides special rules with respect to treatment of unincorporated AFNs. A transfer to or from an unincorporated AFN is attributed to the immediate parent of such AFN (§ 505(a)(1)); and a DI is deemed to have no share in the change in assets of an unincorporated AFN, for purposes of § 313(b), unless the immediate parent of such AFN is either the DI or an incorporated AFN that is an affiliate of the DI (§ 505(a)(4)).

Section 505 excludes from its operation charters of vessels (§ 505(a)(3)) and certain short-term trade credits between AFNs (§ 505(b)). In this connection, the term "time charter" as used in § 505(a)(3) is intended to apply to any vessel charter for a period of time however denominated, including "bareboat" and "voyage" charters.

§ B505–3 Transfers by or to unincorporated AFNs attributed to immediate parent.

Section 505(a)(1) provides that, for purposes of § 505, a transfer of funds or other property by an unincorporated AFN to the DI or to another AFN is treated as a transfer by the immediate parent of such unincorporated AFN (provided that the transferee is not the immediate parent, and that the immediate parent is the DI or an incorporated AFN). Conversely, a transfer to an unincorporated AFN by the DI or by another AFN is treated as a transfer to the immediate parent of the unincorporated AFN (provided that the transferor is not the immediate parent, and that the immediate parent is the DI or an incorporated AFN). Section 505(c) defines the "immediate parent". of an unincorporated AFN owned directly by a DI as the DI itself, while the "immediate parent" of an unincorporated AFN owned indirectly by the DI is the intervening AFN that directly owns the unincorporated AFN. See also § B505–9.

Example 1. DI has a wholly owned incorporated AFN (A) in Scheduled A that has a branch (B) in Schedule B. DI also has an incorporated AFN (C) in Schedule C. In 1969 B lends $100,000 directly to C. The $100,000 is deemed transferred by A (i.e., the immediate parent of B) to C.

If C loaned $100,000 directly to B, the $100,000 would be deemed transferred by C to A (i.e., the immediate parent of B). Likewise, if the $100,000 loan to B were made by a branch of C located in Schedule A, the $100,000 would be deemed transferred by C (i.e., the immediate parent of the branch in Schedule A) to A (i.e., the immediate parent of B).

Example 2. DI has a wholly owned subsidiary (A) in Schedule A that has a branch (B) in Schedule B. In 1969 DI lends $100,000 to B. The $100,000 is deemed transferred by DI to A, the immediate parent of B.

Section 505(a)(1) does not apply if both the transferor and the transferee are unincorporated AFNs and if both have the same immediate parent. Thus, a transfer from a Schedule A branch of a DI to a Schedule B branch of the same DI is not governed by § 505(a)(1); any net changes in net assets of the branches resulting from this transfer will be taken into account under § 313(b).

§ B505–4 Treatment of transfers deemed made under § 505(a)(1).

Section 505(a)(2) provides that any transfer of funds or other property deemed by § 505(a)(1) to be a transfer between the DI and an incorporated AFN shall be treated as a transfer of capital under § 312 if the transaction would have constituted a transfer of capital under § 312 had the parties actually been the DI and the incorporated AFN and, if the transfer is between AFNs of the DI, either the actual transferor AFN or actual transferee AFN is an "affiliate" of the DI as defined in § 903(a).

Under § 903(a) an "affiliate" of a person within the United States is any other person (other than an individual) in which the aggregate of direct interests (defined in § 901) owned by such person and any of its affiliates exceeds 50 percent.

Example 3. DI has a branch (A) in Schedule A and a 60-percent owned subsidiary (C) in Schedule C. In 1969 C lends $500,000 to A. The loan from C to A is deemed made by C to DI, the immediate parent of A, under § 505(a)(1)(ii). If the loan had actually been made by C to DI, it would have constituted a transfer of capital from C to DI under § 312(b)(1). Therefore, under § 505(a)(2), C has made a transfer of capital of $500,000 to DI.

If no other transactions take place during 1969, DI will have made a $500,000 negative net transfer of capital to Schedule C, under § 313(a), and a $500,000 positive net transfer of capital to Schedule A, under § 313(b), the latter being the net increase in A's assets as a result of the loan from C. (If A and C had been located in the same scheduled area, DI's net transfer of capital under § 313(c)) during 1969 to such scheduled area would have been zero.)

Example 4. DI has a branch (B) in Schedule B and a wholly owned subsidiary (A) in Schedule A. During 1969 B lends A $100,000. Under § 505(a)(1), DI is deemed to have

made the loan to A (a transfer of capital under § 312(a)(1)). Therefore, § 505(a)(2) applies, and DI has made a positive net transfer of capital to Schedule A of $100,000 (under § 313(a)) and a negative net transfer of capital to Schedule B (under § 313(b)) of $100,000, the latter being the decrease in B's assets after making the loan to A. (If both AFNs had been in one scheduled area, DI's net transfer of capital under § 313(c) would have been zero.)

Example 5. DI has a wholly owned subsidiary (A) in Schedule A that has a branch (B) in Schedule B. In 1969 DI lends $100,000 directly to B. The transfer results in a $100,000 transfer of capital from DI to A by virtue of §§ 505(a) (1) and (2). To the extent that the transfer results in a net increase in the net assets of the branch, DI will have made a positive net transfer of capital to Schedule B under § 313(b). However, to the extent that DI's share in the increase in B's assets is not attributable to earnings, A is deemed to have made a transfer of capital to DI, according to § 505(a)(6). Therefore, for 1969, DI will have made a net transfer of capital to Schedule A of zero ($100,000 deemed transferred from DI to A, under §§ 505(a) (1) and (2), less $100,000 deemed transferred from A to DI, under § 505(a)(6)) and a net transfer of capital to Schedule B of $100,000.

§ B505–5 Transfers between incorporated AFNs.

Under § 505(a)(3), a transfer of funds or other property from one incorporated AFN to another incorporated AFN (including a transfer deemed under § 505 (a)(1) to have been made between incorporated AFNs) is treated as a transfer of capital by the transferor AFN to the DI (equal to the full amount or value of the funds or other property transferred) and as a further transfer of capital in an equivalent amount from the DI to the transferee AFN. The rule applies only if either the transferor or the transferee AFN is an "affiliate" of the DI, as defined in § 903(a), and if the transfer would have constituted a transfer of capital under § 312 if made by the DI. If the transferor and transferee are in the same scheduled area, the transaction will "net out" (i.e., result in a net transfer of capital of zero) under § 313(a).

Example 6. During 1969 a wholly owned Schedule C subsidiary of DI (C) makes a $200,000 3-year loan to A, a wholly owned Schedule A subsidiary of DI. Under § 505(a) (3), the transaction is treated as a $200,000 transfer of capital from C to DI and a $200,000 transfer of capital from DI to A. Accordingly, the transaction reduces by $200,000 the net transfer of capital made by DI to Schedule C during 1969 and increases by an equivalent amount the net transfer of capital made by DI to Schedule A during the same year. The result would be the same even if neither of the AFNs were wholly owned by DI so long as DI owned more than a 50-percent interest in one of them. Thus, for example, the same result would be reached if DI owned 51 percent of A and only 10 percent of C, or vice versa, the theory being that DI can prevent the transaction if it owns more than a 50-percent interest in either of the AFNs.

Example 7. During 1969 a wholly owned Schedule A subsidiary (A) of DI leases machinery to B, a wholly owned Schedule B subsidiary of DI. The machinery has a value of $1 million when leased and the lease expires in 1972. The transaction is treated under § 505(a) (3) as a $1 million transfer of capital from A to DI and a $1 million transfer of capital from DI to B (see § 312(a) (8)).

Current rental payments under the lease will not involve transfers of capital; rather, they will reduce the earnings of B and increase the earnings of A. When the machinery is returned to A at the end of the lease term, there will be a transfer of capital from B to DI (equal to the residual value of the machinery) and an equivalent transfer of capital from DI to A.

If A had originally leased the machinery from DI, the result would be the same. However, if A had leased the machinery from an unaffiliated person the lease from A to B would involve transfers of capital under § 505(a)(3), only to the extent that the rental paid by B to A in any year is less than the rental paid by A to the principal lessor (see § B312–12).

Example 8. During 1969 a wholly owned Schedule C subsidiary (C) of DI borrows $1 million from a foreign bank. Repayment of the loan is guaranteed by B, a wholly owned Schedule B subsidiary of DI. In 1971 B is called upon to pay $500,000 under its guarantee and makes such payment. The transfer is treated under § 505(a)(3) as a $500,000 transfer of capital from B to DI and a $500,000 transfer of capital from DI to C. Any resulting positive direct investment in Schedule C would be generally authorized under Subpart J of the regulations if DI had filed an appropriate certificate under § 1002(b) within 10 days after the guarantee was made.

Example 9. DI has a wholly owned subsidiary (A) in Schedule A, that has a branch (B) in Schedule B. DI also has a wholly owned subsidiary (C) in Schedule C, that has a branch (X) in Schedule A. During 1969 X lends $100,000 directly to B. Under § 505 (a) (1) and (3), the transaction results in a $100,000 transfer of capital from C to DI and a $100,000 transfer of capital from DI to A. The transfer of funds from X is treated as a transfer from the immediate parent (i.e., C) under § 505(a)(1)(i). The transfer of funds to B is treated as a transfer to its immediate parent (i.e., A) under § 505(a)(1)(ii). Since the transfer is deemed to be from C to A, § 505(a)(3) provides that it is treated as a § 312(b) transfer of capital from C to DI, and then as a § 312(a) transfer of capital from DI to A.

Under § 313(b), DI has made a positive net transfer of capital to Schedule B of $100,000 (the amount of net increase in B's assets) and a negative net transfer of capital to Schedule A (the amount of net decrease in X's assets). Under § 505(a)(5), DI is deemed to have made a § 312(a) transfer of capital to C (the amount of net decrease in X's assets not attributable to losses); and under § 505(a)(6), A is deemed to have made a § 312(b) transfer of capital to DI of $100,000 (the amount of net increase in B's assets not attributable to earnings).

Assuming no other transactions during 1969, DI will report a negative net transfer of capital of $100,000 to Schedule A, a positive net transfer of capital of $100,000 to Schedule B and a zero net transfer of capital to Schedule C.

Example 10. During 1970, DI's AFN (A) in Schedule A deposits $2 million with a German bank as collateral for a $2 million loan by the bank to DI. DI treats the loan as long-term foreign borrowing and allocates the proceeds to positive direct investmen in Schedule C in accordance with § 306 (e). The deposit, if made by the DI, would have constituted a § 312(a)(9) transfer of capital to Schedule C. By operation of § 505 (a)(3), DI should report for 1970 (i) a § 312(b) transfer of capital of $2 million from Schedule A and a § 312(a) transfer of capital of $2 million to Schedule C on account of the deposit by A and (ii) a § 306(e) deduction of $2 million from positive direct investment in Schedule C.

In 1972 DI repays the borrowing, and A withdraws its deposit. For 1972, DI should report (i) a § 312(b) transfer of capital of $2 million from Schedule C and a § 312(a) transfer of capital of $2 million to Schedule A on account of the withdrawal of the deposit and (ii) a § 312(a)(7) transfer of capital of $2 million to Schedule C for repayment of long-term foreign borrowing.

§ B505–6 Purchase and sale of interests in other AFNs.

Section 505(a)(3) also covers the purchase and sale by incorporated AFNs of interests in other AFNs.

The following general rules are applicable to such transactions:

(i) *Purchase of AFN.* If an incorporated AFN acquires from an unaffiliated foreign national an interest in a foreign national that becomes an AFN of the parent DI as a result of the acquisition, the full purchase price is treated as a transfer of capital by the acquiring AFN to the DI and as a further transfer of capital by the DI to the acquired AFN. However, if the acquisition is made after December 31, 1967, and the acquired AFN has subsidiaries and/or branches in other scheduled areas that become separate AFNs of the DI as a result of the acquisition, the transfer of capital by the DI should be allocated among the different scheduled areas involved in a manner fairly reflecting the respective values of the direct and indirect interests acquired. As a general rule, an allocation based on the respective book values of the entities involved is acceptable. The result is the same whether the acquiring AFN pays cash or gives a debt obligation in exchange for the interests acquired. If, however, the consideration for the acquisition is stock of the acquiring AFN, no transfer of capital to or from the DI will result.

(ii) *Sale of AFN.* If an incorporated AFN sells an interest in another AFN to an unaffiliated foreign national, there will be a transfer of capital by such other AFN to the DI in an amount equal to the purchase price and a further transfer of capital by the DI to the selling AFN in an amount equal to the cost or other basis to the selling AFN of the interest sold. Any capital gain or loss realized by the selling AFN from the sale will be included in determining the earnings of the AFN for the period involved. An allocation of the transfer of capital to the DI among different scheduled areas will be required (generally, based on relative book value of the components divested) if the interest sold was acquired after December 31, 1967, and the AFN in which the interest is sold has subsidiaries and/or branches in different scheduled areas that are separate AFNs of the DI. The result is the same whether the selling AFN receives cash or a debt obligation of the purchaser in exchange for the sale. If, however, consideration for the sale is stock in a foreign national that becomes an AFN as a result of the transaction, no transfer of capital to or from the DI will result.

Example 11. During 1969 a wholly owned Schedule B subsidiary (B) of DI purchases from an unaffiliated foreign national, for $1 million in cash, all of the stock of a Schedule C corporation (C). Under § 505 (a)(3), the transaction is treated as a

$1 million transfer of capital from B to DI and a $1 million transfer of capital from DI to C. Accordingly, the transaction reduces by $1 million the net transfer of capital made by DI to Schedule B during 1969 and increases by an equivalent amount the net transfer of capital made by DI to Schedule C during the same year.

If B had paid only $500,000 in cash and gave a 5-year note to the seller for the $500,000 balance of the purchase price, the result would be the same. No transfers of capital will be involved when B subsequently makes payments on the note.

The result would also be the same even if DI owned only 51 percent of the Schedule B AFN. Note, however, that if DI owned an interest of 50 percent or less in the Schedule B AFN, the transaction would not involve any transfer of capital to or from DI, regardless of the amount of the interest in the Schedule C corporation acquired by the Schedule B subsidiary, since the DI is presumed in this situation to lack control over the transaction. Note also that if the acquiring and the acquired corporation were in the same scheduled area, the transaction would effectively "net cut."

Example 12. DI has a wholly owned Schedule B subsidiary (B) that has a wholly owned Schedule C subsidiary (C). During 1969, B sells all stock of C, that had been purchased for $500,000, to an unaffiliated foreign national for $1 million in cash. Under § 505(a)(3), the transaction is treated as a $1 million transfer of capital from C to DI and a $500,000 transfer of capital from DI to B. The $500,000 profit (measured by historical cost) realized by B will be taken into account in calculating that subsidiary's 1969 earnings.

If B had received $500,000 in cash and a 5-year note of the purchaser for the $500,000 balance of the purchase price, the result would be the same. No transfers of capital will be involved when B subsequently receives payments on the note.

The result would be the same even if DI owned only 51 percent of the Schedule B AFN. Note, however, that if DI owned an interest of 50 percent or less in the Schedule B AFN, the transaction would not involve any transfer of capital to and from DI, since the DI is presumed in this situation to lack control over the transaction.

Example 13. In 1969, DI's wholly owned incorporated AFN (C) in Schedule C acquired a 50 percent profits interest in a joint venture (B) in Schedule B from an unaffiliated foreign national for $1 million cash. During 1969 B earned $100,000 which it remitted to C and the other owners. In 1970, C's interest in B is purchased by the local government for $1,200,000. Assuming no other transactions during 1970, DI should report a negative net transfer of capital with respect to B of $1,200,000, a positive net transfer of capital to C of $1 million and reinvested earnings for C of $200,000 (gain on the sale).

Example 14. DI has a wholly owned incorporated AFN (C) in Schedule C, which has a subsidiary A in Schedule A. During 1970, C sells its interest in A (acquired for $2 million) to B, a wholly owned incorporated AFN of DI in Schedule B, for $2 million in cash. By operation of § 505, DI should report a negative transfer of capital from Schedule B of $2 million and a positive transfer of capital to Schedule C of $2 million.

Example 15. In 1969, DI's wholly owned incorporated AFN (A) in Schedule A acquired a 50 percent profits interest in a joint venture (B) in Schedule B for $1 million, the other 50 percent being held by an unaffiliated foreign national (X). For 1969, DI reported a net transfer of capital of $1 million to Schedule B and a negative net transfer of capital of $1 million to Schedule A.

During 1970, DI's wholly owned subsidiary (C) in Schedule C acquires A's interest in B for $2 million. B earns $400,000 in 1970 and remits $100,000 each to C and X. B's net assets increase by $200,000. Assuming no other transactions during 1970, DI should report a negative transfer of capital from C of $2 million and reinvested earnings for C of $100,000; a net transfer of capital to Schedule B of $100,000; a positive transfer of capital to A of $1 million and reinvested earnings for A of $1 million (gain on the sale of B to C).

§ B505–7 Transactions between AFNs not involving transfers of capital.

Transfers between AFNs will not involve transfers of capital to or from the DI unless the transfer, if actually made by the DI, would be a transfer of capital under § 312. Consequently, the transactions described in § 312(c) will not result in transfers of capital when carried out by AFNs. See § B312–18 and 19.

(i) *Stock for stock transactions and reorganizations.* As a general rule, a transfer of capital to or from a DI will not be involved under § 505(a)(3) if (a) an AFN of a DI transfers an interest in a lower-tier AFN and receives in exchange stock of a foreign corporation that becomes an AFN of the DI as a result of the transaction or if (b) there is a recapitalization, reorganization, merger or consolidation involving one or more AFNs. Although a foreign enterprise may cease to be an AFN of a DI as a result of the transaction, the transaction does not affect the amount of direct investment made by the DI during the base period years in the scheduled area of such foreign enterprise.

Example 16. B, a wholly owned Schedule B subsidiary of DI, transfers to an unaffiliated foreign national all of the stock of a wholly owned Brazilian subsidiary in exchange for all of the stock of a French corporation. The transaction does not result in any transfer of capital to or from DI. However, as a result of the transaction DI becomes a DI in the French corporation and ceases to be a DI in the Brazilian corporation. (The result would be the same if the other party to the transaction were also an AFN of DI.)

Example 17. A wholly owned German subsidiary of DI is reincorporated in the United Kingdom (or, alternatively, merged into a wholly owned United Kingdom subsidiary of the DI). Neither transaction results in any transfer of capital to or from the DI. However, the business of the newly created United Kingdom subsidiary (or the United Kingdom subsidiary after the merger) that is conducted in Germany will be a branch of the United Kingdom subsidiary and may, therefore be a separate unincorporated Schedule C AFN of DI by operation of § 304.

(ii) *Transfers of certain intangibles.* A transfer of property from one AFN to another AFN of the same DI before or after January 1, 1968, in exchange for a debt or equity interest in the transferee AFN does not involve a transfer of capital to or from the DI (regardless of the form of the transfer or the consideration exhanged therefor) if the property transferred consists of patents, copyrights, trademarks, trade names, trade secrets, technology, proprietary processes, proprietary information, or similar intangibles or any rights or interests therein or applications or contracts relating thereto (see § 312(c)(11)). No deduction for amortization or any like charge with respect to such an intangible transferred after January 1, 1968, shall be made against earnings in calculating the earnings of the transferee AFN.

(iii) *Vessel charters.* Any charter of a vessel for a period of time made or deemed made by an incorporated AFN to another incorporated AFN of the DI is excluded from treatment as a transfer of capital under § 505(a)(3). This exclusion applies to voyage and bareboat charters as well as to time charters.

Example 18. During 1969 a wholly owned Panamanian subsidiary (A) of DI, charters one of its ships to C, a wholly owned German subsidiary of the DI, for a period of 6 months. There is no transfer of capital to or from DI under § 505(a)(3).

(iv) *Short-term trade credits between AFNs.* Section 505(b) provides, in effect, that the extension or satisfaction of a short-term trade credit between non-Canadian AFNs (see § 1103(c)) of a DI will not result in a transfer of capital to or from the DI, or in any net change in the net assets of an unincorporated AFN extending or receiving such credit for purposes of § 313(b). Section 505(b) applies to trade credits that are extended in the ordinary course of business pursuant to arm's-length terms and are in fact paid within 12 months after they are extended.

Example 19. On September 1, 1969, a wholly owned French subsidiary (C) of DI, sells equipment to A, a Brazilian subsidiary of DI in the ordinary course of business pursuant to arm's-length terms. The $1 million purchase price is payable in full by March 1, 1970. There is no transfer of capital to or from DI. (The result would be the same if the sale of services, rather than the sale of goods, were involved.) If, however, no part of the purchase price is paid by September 1, 1970, there would be a $1 million transfer of capital from C to DI and from DI to A, deemed to have occurred on September 1, 1970, or on such sooner date as it became apparent that A would not be able to make payment prior to September 1, 1970. (The result would be the same if the sale of services, rather than the sale of goods, were involved.)

§ B505–8 Transactions between AFNs and their branches in different scheduled areas.

The net transfer of capital by a DI to unincorporated AFNs in any scheduled area during any period will generally equal the DI's share in the aggregate net increase or decrease, during the year, in such AFNs' aggregate net assets (see § 313(b)). This calculation is based on changes in the net assets of all unincorporated AFNs located in such scheduled area, including those in which DI has an indirect interest, e.g., a branch of an AFN that is headquartered in another scheduled area. However, § 505(a)(4) provides that a DI is chargeable with a net transfer of capital only to unincorporated AFNs the immediate parent of which is either the DI or another AFN that is an "affiliate" of the DI as defined in § 903(a).

While a DI's share of the change in net assets of a § 903(a) affiliate incorporated AFN's branch is automatically included

in the DI's net transfer of capital to the scheduled area where the branch is located, certain changes in branch assets also result in a corresponding transfer of capital from or to the parent AFN. Section 505(a) (5) and (6) provides that a corresponding transfer of capital from or to the parent occurs when the net increase or decrease in branch assets cannot be attributed to earnings or losses of the branch.

The same principles apply to transactions involving an incorporated AFN that has a less than 100 percent profits interest in a joint venture or a partnership, rather than a branch (which is presumably 100 percent-owned). See § B313–4(ii), especially Example 8, and § B505–9 below.

Example 20. DI has a wholly owned AFN in France (Schedule C), that has a branch in Brazil (Schedule A). DI has no other AFNs. During 1969 the branch has earnings of $50,000 but its net assets increase by $100,000 because of a transfer of $50,000 from the AFN to the branch. This results, under § 313(b), in a $100,000 positive net transfer of capital to Schedule A (DI's share of the net increase in branch assets) and, under § 505(a) (6), in a $50,000 negative net transfer of capital to Schedule C (the amount by which DI's share in the net increase in branch assets ($100,000) exceeded DI's share in the branch's earnings ($50,000)).

If DI owned only 60 percent of the French AFN, the result would be a $60,000 positive net transfer of capital to Schedule A (60 percent of $100,000) and a $30,000 negative net transfer of capital to Schedule C (60 percent of $50,000). If DI owned 50 percent or less of the French AFN, no net transfer of capital would be involved.

The following are variations of the facts given above:

(a) *Positive earnings-decrease in assets.* If the branch had 1969 earnings of $50,000 but its net assets decreased by $150,000 because of a remittance of $200,000 to the parent AFN, this would result, under § 313 (b), in a $150,000 negative net transfer of capital to Schedule A (DI's share of the $150,000 net decrease in branch assets) and, under § 505(a) (5), in a $150,000 positive net transfer of capital to Schedule C (DI's share of the $150,000 net decrease in branch assets not attributable to losses). Moreover, the full amount of branch earnings ($50,000) would be treated as having been distributed to the Schedule C parent and would be deducted from dividends paid by the parent to DI (see § B306–6(iii)). If DI owned only 70 percent of the French AFN, the result would be a $105,000 negative net transfer of capital to Schedule A (70 percent of $150,000) and a $105,000 positive net transfer of capital to Schedule C (70 percent of $150,000). Moreover, $35,000 of the earnings of the branch (DI's 70 percent share of the $50,000 branch earnings) would be treated as having been distributed to the Schedule C parent and should be deducted from dividends paid by the parent to DI. If DI owned 50 percent or less of the French AFN, no net transfer of capital would be involved; however, an appropriate percentage of the earnings of the branch would still be treated as having been distributed to the Schedule C parent and would be deducted from dividends paid by the parent to DI.

(b) *Zero earnings-decrease in assets.* If the branch had 1969 earnings of zero and net assets decreased by $100,000 because of a remittance of $100,000 to the parent AFN, this would result, under § 313(b), in a $100,000 negative net transfer of capital to Schedule A (DI's share of the $100,000 net decrease in branch assets) and, under § 505(a) (5), in a $100,000 positive net transfer of capital to Schedule C (DI's share of the $100,000 net decrease in branch assets not attributable to losses).

(c) *Loss-no change in assets.* If the branch incurred a loss of $100,000 during 1969, but there was no change in net assets because of a transfer of $100,000 from the parent AFN, this would result, under § 505(a) (6), in a $100,000 negative net transfer of capital to Schedule C (DI's share of the $100,000 loss).

(d) *Loss-increase in assets.* If the branch incurred a loss of $100,000 during 1969 but had a $50,000 increase in net assets because of a transfer of $150,000 from the parent AFN, this would result, under § 313(b), in a $50,000 positive net transfer of capital to Schedule A (DI's share of the $50,000 net increase in branch assets) and, under § 505(a) (6), in a $150,000 negative net transfer of capital to Schedule C (DI's share of the $50,000 net increase in net assets plus DI's share of the $100,000 loss).

(e) *Decrease in assets smaller than loss.* If the branch incurred a loss of $100,000 during 1969 while net assets decreased by only $25,000 because of a transfer of $75,000 from the parent AFN, this would result, under § 313(b), in a $25,000 negative net transfer of capital to Schedule A (DI's share of the $25,000 net decrease in branch assets) and, under § 505(a) (6), in a $75,000 negative net transfer of capital to Schedule C (the amount by which DI's share of the loss ($100,000) exceeds DI's share of the net decrease in branch assets ($25,000)).

(f) *Decrease in assets greater than loss.* If the branch incurred a loss of $100,000 during 1969 while net assets decreased by $250,000 because of a remittance of $150,000 to the parent AFN, this would result, under § 313(b), in a $250,000 negative net transfer of capital to Schedule A (DI's share of the $250,000 net decrease in branch assets) and, under § 505(a) (5), in a $150,000 positive net transfer of capital to Schedule C (DI's share of the $250,000 net decrease in branch assets not attributable to the $100,000 loss).

§ B505–9 Miscellaneous transactions.

An unincorporated AFN may have two or more immediate parents that are AFNs of the DI. The DI's interest in the unincorporated AFN held through any immediate parent that is not a § 903(a) affiliate of the DI should be excluded in calculating DI's net transfer of capital under § 313(b).

Example 21. DI has a wholly owned subsidiary (A) in Schedule A and a 50 percent owned subsidiary (C) in Schedule C. A and C each have a 50 percent profits interest in a joint venture (B) in Schedule B. During 1970 B earns $1 million, and its net assets increase by $1 million. DI's net transfer of capital under § 313(b) with respect to B is $500,000. DI's share of the increase in the assets of B attributable to C is excluded because C is not a § 903(a) affiliate of DI. If C were 60 percent owned by the DI, DI's share of B's increase in assets for 1970 would be $800,000: A's share (50% × 1,000,000) × 100%, plus C's share (50% × 1,000,000) × 60%.

During 1971, C (60% owned) makes a $1 million loan to B. For purposes of § 313(b) B has a net increase in its assets of $1 million. C's share of such increase is $1 million, and A's share is zero. See Example 8 in § B313–4. DI's share of the increase in B's assets is $600,000 (60% of C's share). For 1971 DI should report a net transfer of capital under § 313(b) to Schedule B of $600,000 and a negative net transfer of capital to Schedule C under §313(a) of $600,000.

Example 22. DI has a wholly owned incorporated AFN (C) in Schedule C and a wholly owned incorporated AFN (A) in Schedule A. A and C, respectively, have a 40 percent and a 60 percent profits interest in a joint venture (B) in Schedule B. During 1970 DI lends $100,000 to B. Under § 505(a) (1) and (2), DI is deemed to have made a $40,000 transfer of capital to A (40 percent of $100,000) and a $60,000 transfer of capital to C (60 percent of $100,000). B has a net increase in assets of $100,000, which is not attributable to earnings; therefore, under § 505(a) (6), A is deemed to have made a transfer of capital to DI of $40,000, and C is deemed to have made a transfer of capital to DI of $60,000. Consequently, DI's net transfer of capital to each scheduled area for 1970 is as follows: Schedule A, zero; Schedule B, $100,000; Schedule C, zero.

Example 23. Same facts as in Example 22, except that A is 75 percent owned by DI and C is 50 percent owned. In this case, the loan from DI to B would constitute a transfer of capital under § 505(a) (1) and (2) to A of $40,000 and to C of $60,000 as in Example 22. However, since C is not an affiliate of DI, DI's share of B's increase in assets is only $30,000 (A's 40 percent share × 75 percent). Under § 505(a) (6), A is deemed to have made a transfer of capital to DI of $30,000. C, not being an affiliate, is not deemed to have made a transfer of capital to DI under § 505(a) (6). Therefore, DI's net transfer of capital to each scheduled area is as follows: Schedule A, $10,000; Schedule B, $30,000; Schedule C, $60,000.

If A and C were each 50 percent owned by DI, DI's loan to B would still be deemed made to A and C under § 505(a) (1) and (2) in accordance with the percentage interests of A and C in B. But since neither A or C is an affiliate of DI, DI would have no share in B's increase in assets (see § 505(a) (4)) and no transfers would be deemed made under § 505(a) (6). Consequently, DI's net transfer of capital to each scheduled area would be as follows: Schedule A, $40,000; Schedule B, zero; Schedule C, $60,000.

B506—Incremental Earnings Allowable

§ B506–1 Introduction.

In addition to the § 503, § 504, or § 507 allowable which is elected under § 502, an incremental earnings allowable is provided by § 506. The incremental earnings allowable is a separate allowable that authorizes the making of positive direct investment in excess of that permitted by § 503, § 504, or § 507, whichever may have been elected by the DI. The § 506 incremental earnings allowable is available to DIs for use in 1970 and succeeding years.

§ B506–2 Summary.

The incremental earnings allowable, if any, available to a DI will be the amount by which 40 percent of incremental earnings (defined in § 506(a) (3)) for the current year exceeds the greatest amount of positive direct investment authorized in all scheduled areas pursuant to § 503, § 504(a), or § 504(b). For purposes of this calculation, it is immaterial whether the DI has elected to be governed by § 503, § 504, or § 507 for the current year.

The additional positive direct investment authorized by § 506 may be made in any or all scheduled areas.

Unused § 506 allowables may be carried forward to succeeding years.

§ B506–3 Calculation of incremental earnings allowable.

The following steps are required to calculate the incremental earnings allowable:

Compute current aggregate annual earnings (annual earnings, as defined in § 504(b)(4)) of all incorporated and unincorporated AFNs for all scheduled areas combined, excluding Canada;

Compute base period aggregate annual earnings; i.e., 50 percent of the sum of aggregate annual earnings for the years 1966 and 1967 (but not less than zero); and

Determine the current year's incremental earnings, if any, by subtracting base period aggregate annual earnings from aggregate annual earnings for the year involved.

The incremental earnings allowable is the amount by which 40 percent of the DI's incremental earnings exceeds the greatest amount of positive direct investment authorized to be made by the DI in all scheduled areas for the current year under § 503 or § 504 (excluding any carryforward of allowables from prior years, and without regard to any reduction under § 1003, authorization or compliance action, or to the § 502 election actually made).

The following examples illustrate calculation of the § 506 allowable:

Example 1. DI has an AFN (A) in Pakistan. In 1966 A had losses of $100,000 and in 1967 earnings of $500,000. DI's base period aggregate annual earnings under § 506(a)(2) is $200,000 ($500,000 − $100,000 divided by 2).

Assume that DI's historical and earnings allowables under § 504 (a) and (b) are each less than $1 million. In 1970 A has earnings of $3,400,000.

DI's incremental earnings allowable under § 506 in 1970 is $280,000, calculated as follows (000 omitted):

1970 aggregate annual earnings	$3,400
Deduct: Base period aggregate annual earnings	−200
Incremental earnings	3,200
40 percent of incremental earnings	1,280
Deduct: Largest of available allowables (i.e., § 503)	−1,000
Incremental earnings allowable	280

Example 2. DI has six AFNs: Two incorporated in Schedule A, two incorporated in Schedule B and two branches in Schedule C. In 1966 the AFNs had aggregate annual losses of $200,000 and in 1967 aggregate annual earnings of $100,000. DI's base period aggregate annual earnings are, therefore, zero.

Assume that DI's historical allowables in Schedules A and B are, respectively, $300,000 and $400,000. The Schedule C historical allowable is zero. Accordingly, DI's § 504(a) allowables for all scheduled areas are $700,000.

In 1969 the AFNs had annual earnings of $1,500,000 in Schedule A, $1,200,000 in Schedule B, and $1 million in Schedule C. Therefore, DI's 30 percent earnings allowable for 1970 is $450,000 in Schedule A, $360,000 in Schedule B and $300,000 in Schedule C; a total of $1,110,000 worldwide. In 1970 the AFNs have aggregate annual earnings of $4,000,000.

DI's incremental earnings allowable for 1970 is $490,000, computed as follows (000 omitted):

1970 aggregate annual earnings	$4,000
Deduct: Base period aggregate annual earnings	0
Incremental earnings	4,000
40% of incremental earnings	1,600
Deduct: Largest of available allowables (i.e., § 504(b))	−1,100
Incremental earnings allowable	490

§ B506–4 Application of the § 506 allowable.

Unlike the allowables provided in §§ 504 and 507, which are schedular, the incremental earnings allowable applies on a worldwide basis. In other words, the additional direct investment authorized by § 506 can be made entirely in one scheduled area, or can be divided among two or more scheduled areas. Any unused § 506 allowable may be carried forward to subsequent years for use in any one or more scheduled areas, without regard to the election made under § 502.

Section 506(b) applies to DIs that elect § 503. Positive direct investment is authorized in excess of $1 million to the extent of the incremental earnings allowable. Since § 506 may be used on a worldwide basis, DIs that elect § 503 may treat the incremental earnings allowable as an addition to the $1 million minimum allowable.

Section 506(c) applies to DIs electing the schedular allowables of §§ 504 and 507. In such cases, the incremental earnings allowable may be used to authorize additional positive direct investment in a given scheduled area or distributed among two or all of the scheduled areas. In calculating positive direct investment made under § 506 in Schedule C, a DI electing § 504 must disregard total losses of all incorporated Schedule C AFNs in accordance with § 504(e).

Example 3. In 1970 DI elects to be governed by § 504(a), and has historical allowables of $5 million, $6 million, and $4 million in Schedules A, B, and C, respectively. DI also has an incremental earnings allowable of $1 million.

DI makes positive direct investment of $7,500,000 in Schedule A, $4 million in Schedule B and $4,500,000 in Schedule C, all of which is authorized. In Schedule A, $5 million is authorized by § 504(a), $2 million of the Schedule B historical allowable is carried "downstream" pursuant to § 504(d), and $500,000 of the § 506 allowable is used. In Schedule C, $4 million is authorized by § 504 and the remaining $500,000 is authorized by § 506.

Example 4. During 1970 DI elects § 504 with an allowable in Schedule C of zero. DI also has a § 506 incremental earnings allowable of $200,000. During 1970 DI's Schedule C AFNs have total losses of $100,000. If DI desires to use the incremental earnings allowable in Schedule C, DI may make a positive net transfer of capital not in excess of $200,000; i.e., the losses will not be an offset for purposes of computing positive direct investment made in Schedule C under § 506. See § 506(c).

§ B506–5 Carryforward of the § 506 allowable.

Unused § 506 allowables may be carried forward to subsequent years for use in any scheduled area, even though DI may have elected § 503 or § 507, which do not authorize carryforwards and eliminate §§ 504 and 1302 carryforwards.

Example 5. DI elects to be governed by § 503 in 1970 and has an incremental earnings allowable of $200,000. During 1970, DI makes positive direct investment worldwide of $1,100,000. DI has a § 506 carryforward of $100,000.

Example 6. In 1970 DI has historical allowables of $7 million in Schedule A and $7 million in Schedule C. DI also has a carryforward allowable of $1 million in Schedule A pursuant to § 504(d)(1) and an incremental earnings allowable under § 506 of $1 million. During 1970, DI makes positive direct investment of $8 million in Schedule A and $7 million in Schedule C.

DI will be permitted to use the $1 million incremental earnings allowable in any scheduled area in subsequent years.

§ B506–6 Miscellaneous.

Repayment charges incurred under § 1003 in connection with repayment of certain borrowings will, starting in 1970, reduce the § 506 incremental earnings allowable to the extent that such repayments exceed the DI's § 503, § 504, or § 507 allowables. See § 1003(c)(2).

B507 — Alternative Minimum and Schedule A Supplemental Allowable

§ B507–1 Introduction.

Commencing in 1970, a DI may elect the § 507 alternative minimum and Schedule A supplemental allowable.

Section 507 provides, in effect, that a DI may make positive direct investment during 1970 of $1 million on a modified worldwide basis and an additional $4 million in Schedule A. The § 507 allowable comprises a $4 million allowable for Schedule A and a $1 million allowable for Schedules B and C combined (sometimes referred to as "Schedules B/C"). See § 507(a) (1) and (2). To the extent not used in Schedules B/C, the $1 million allowable under § 507(a)(1) may be used in Schedule A in addition to the $4 million authorized exclusively for Schedule A under § 507(a)(2). See § 507(b) and Examples 2, 3, and 4 below. Direct investment in Schedules B and C is to be computed in the same manner as worldwide direct investment under § 503. See Example 1 below. Thus, § 507 is basically a schedular allowable similar to § 504 but consists of two scheduled areas rather than three. It should be noted that while § 505 interschedular transfers from Schedule B to Schedule C will net out under § 507, transfers from Schedule A to Schedule B or C will not net out, and the resulting positive direct investment in Schedules B/C must be authorized by the $1 million allowable under § 507(a)(1). See Examples 5 and 6 below.

On the other hand, § 507 is similar to § 503 in the following respects:

(i) Unused allowables under § 507 may not be carried forward to succeeding years, and carryforwards from prior years under §§ 504 and 1302 are lost when § 507 is elected (see § 507(c));

(ii) A DI that elects to be governed by § 507 is not subject to the prohibitions of § 203(d)(1); and

(iii) The use of § 507 by members of an associated group and consenting owners of a principal DI is governed by the limitations of amended §§ 905 and 906.

§ B507-2 Application of the § 507 allowable.

Under § 507, direct investment in Schedule A is calculated separately from direct investment in Schedules B and C. For purposes of § 507(a)(1), direct investment in Schedules B and C is aggregated.

Example 1. DI has a wholly owned subsidiary (C) in Schedule C, which has a wholly owned subsidiary (A) in Schedule A, and DI has a wholly owned subsidiary (B) in Schedule B. During 1970 the following occurs: DI makes a transfer of capital of $4 million to A. A earns $200,000 and pays dividends of $200,000 to C. B makes a transfer of capital of $500,000 to DI. DI makes a transfer of capital of $1,300,000 to C. DI correctly reports positive direct investment in Schedule A of $4 million and in Schedules B and C of $1 million, all of which is authorized by § 507, computed as follows ($000 omitted):

	Scheduled area			
	A	B	C	B/C aggregate
Net transfer of capital	4,000	(500)	1,300	800
Reinvested earnings	0	0	200	200
Positive direct investment	4,000	(500)	1,500	1,000

Example 2. During 1970 DI acquires an AFN in Schedule A from an unaffiliated foreign national for $5 million and makes no direct investment in Schedule B or C. The $5 million positive direct investment is authorized by § 507(a)(2) and (b).

Example 3. During 1970 DI's AFN (C) in Schedule C makes a transfer of capital of $500,000 to DI, and DI's Schedule B AFN (B) makes a transfer of capital of $1,500,000 to DI. DI has negative direct investment in Schedules B/C of $2 million. Therefore, under § 507(a)(2) and (b), DI may make $7 million of positive direct investment in Schedule A during 1970.

Example 4. The following table illustrates the "downstream" use of the basic $1 million allowable pursuant to § 507(b) ($000 omitted):

If direct investment made in Schedules B/C is:	Then direct investment authorized by § 507 (a)(2) and (b) in Schedule A will be:
500	4,500
0	5,000
(2000)	7,000

Example 5. During 1970 DI makes a transfer of capital of $5 million to its Schedule A incorporated AFN (A). A, in turn, lends $5 million to DI's Schedule C incorporated AFN (C). By operation of § 505(a)(3), DI has made positive direct investment in Schedule A of zero and in Schedule C of $5 million. Only $1 million of the Schedule C investment is authorized by § 507, and DI is out of compliance to the extent of $4 million in Schedule C.

Example 6. DI has a 60 percent-owned subsidiary (C) in Schedule C. C has a branch (A) in Schedule A. DI transfers $4 million to A. A has no earnings, and its net assets increase by $4 million. Assuming no other transactions, DI has made positive direct investment of $2,400,000 in Schedule A and $1,600,000 in Schedule C, computed as follows ($000 omitted):

	Scheduled area	
	A	C
Transfers of capital:		
§ 505(a) (1) and (2)		4,000
§ 505(a) (6)		(2,400)
Net transfers of capital:		
§ 313(b)	2,400	
§ 313(a)		1,600
Positive direct investment	2,400	1,600

DI is out of compliance under § 507 to the extent of $600,000 in Schedule C.

§ B507-3 Related provisions.

DIs electing § 507 in 1970 should see § 306(e)(3), discussed in § B306-7, if they contemplate repayment or reallocation of borrowings deducted from § 503 worldwide positive direct investment under § 306(e) in 1969.

The use of § 507 by members of an associated group and consenting owners of a principal DI is limited. See §§ 905-(b)(2) (ii) and (iii) and 906(b)(3) (iii) and (iv).

Reduction under § 1003 of the $4 million Schedule A supplemental allowable provided for in § 507(a)(2) is governed by § 1003(c)(5) and (d). (See § B1003-1 (iii).)

As provided by § 502 (c) and (d), a DI may not elect § 503 in one year, starting in 1970, and § 507 in the next year, or vice versa, without obtaining prior written permission from OFDI.

If two DIs combine, by merger or otherwise, during the year, the surviving DI is entitled to only one § 507 allowable for such year.

DIs that elect § 507 may also use the § 506 incremental earnings allowable, but not the foreign air transport earnings allowable of § 1302.

B801—Applications for Specific Authorizations or Exemptions or for Interpretive Opinions

§ B801-1 Introduction.

Section 201 prohibits DIs from making positive direct investment in AFNs in excess of amounts generally authorized by the regulations, or as may be specifically authorized by OFDI. Section 801 provides that DIs may file applications for specific authorizations to effect positive direct investment otherwise prohibited and specific exemptions from complying with particular requirements of the regulations. In addition, DIs may file requests for interpretive opinions concerning particular factual situations, including those involving the possibility that a DI may have to apply for a specific authorization or exemption.

§ B801-2 Procedures.

Applications for specific authorizations or exemptions and requests for interpretive opinions must be submitted in writing and must comply with instructions contained in the Revised Instructions for Submitting Applications for Specific Authorizations or Exemptions or for Interpretive Opinions (the "Instructions"), issued by OFDI on September 11, 1970 (attached as the Appendix hereto), as they may be amended and supplemented from time to time.

If a DI is uncertain whether it may or may not require a specific authorization or exemption concerning a particular transaction, a combined request for an interpretive opinion or, in the alternative, a specific authorization or exemption may be submitted.

§ B801-3 Particular authorizations or exemptions.

Note that Part I of the Instructions sets forth particular requirements concerning applications for specific authorizations or exemptions regarding (a) merchandise export credit extended by a DI to its AFNs (paragraph C), (b) reinvested earnings of AFNs (paragraph D), (c) foreign equity financing of direct investment (paragraph E), (d) the requirement to repatriate to the United States available proceeds of long-term foreign borrowing (paragraph F), (e) triangular or parallel financing arrangements (paragraph G), (f) an increase in the amount of liquid foreign balances that a DI can hold (paragraph H), (g) upstreaming to Schedule C of § 504(b) earnings allowable (paragraph I), and (h) capitalized exploration expenditures (paragraph J).

In the 1969 General Bulletin, specific authorizations in connection with overseas finance subsidiaries of DIs were discussed in this section of the Bulletin. A new Subpart N, effective as of January 1, 1970, now provides for such overseas finance subsidiaries, so that DIs no longer need obtain a specific authorization to utilize such AFNs in the manner set forth in Subpart N.

B900—Subpart I (§§ 901-907)

§ B900-1 Introduction.

Subpart I of the regulations (§§ 901-907) deals with direct investment by persons within the United States who are related, affiliated or associated with other persons within the United States. These relationships are described as affiliated groups (§ 903), family groups (§ 904), associated groups (§ 905), and ownership of direct investors (§ 906). Section 907 provides rules for reporting direct investment transactions involving such groups. Sections 901 and 902 define the terms "direct interests" and "indirect interests," which are significant in determining:

Existence of a DI-AFN relationship under §§ 304 and 305;

A DI's share in reinvested earnings of an incorporated AFN under § 306(b);

Whether an AFN is an "affiliate" of a DI, so that transfers made by or to the AFN should be attributed to the DI under § 505;

Existence of an affiliated or associated group under §§ 903 and 905; and

Availability and consequences of an election under § 906(b)(1).

Members of an affiliated group or a family group are treated as a single entity for reporting and compliance purposes under the regulations. An affiliated group consists of a U.S. person and all of such person's U.S. affiliates (see § 903). A family group consists of all family members residing in the same household (see § 904). An affiliated or family group files a consolidated Form FDI-101 (Base Period Report), FDI-102 (Cumulative

Quarterly Report), and FDI–102F (Annual Report); members of the group do not file reports individually (see § 907(d)).

Two or more U.S. persons acting in concert to own or acquire an aggregate 10 percent or greater interest in a foreign national constitute an associated group. Each member of an associated group is treated as a separate DI in the AFN acquired (the "group AFN"), and is required to report individually unless certain requirements pertaining to consolidated reporting are met (see §§ 905 (b)(3) and 907(c)(2)).

Direct investment transactions of a DI normally will not be attributed to any other person merely because such other person owns an interest in the DI. However, an option under § 906(b)(1) is available to direct owners of a DI, whereby each such owner may elect to be put in the position of the DI as to direct investment, allowables and foreign balances, in accordance with such owner's proportionate interest in the DI.

§ B901–1 Definition of direct interest.

A direct interest in a corporation, partnership, joint venture, trust or other entity is defined in § 901 as an interest that is not owned through an intervening person or chain of persons.

(i) *Direct interest in a corporation.* The amount of a direct interest in a corporation is determined by the percentage held of total combined voting power (represented by all outstanding voting securities of the corporation). Voting power means the power to vote presently in an election of directors of the corporation or, if the corporation does not have directors, in the election or appointment of persons performing management control functions. Treasury shares and shares reserved for issuance upon the exercise of options, warrants, conversion or other similar rights, and shares owned by a wholly owned subsidiary, are not deemed outstanding for purposes of determining the magnitude of a direct interest.

Example 1. As of January 1, 1969, a corporation (X) has 100,000 outstanding shares of capital stock, 60,000 of which are class "A" common, 20,000 are class "B" common, and 20,000 are preferred. In the election of directors, each class A carries three votes and each class B share carries one vote. Holders of preferred stock are entitled to vote on major matters such as mergers, consolidations, etc., or amendments to the certificate of incorporation affecting the preferred stock; they are not entitled to vote in the election of directors unless four quarterly dividend payments are in arrears. Y, an individual, owns 8,000 shares of class A common stock, 6,000 shares of class B common stock and 500 shares of preferred stock. No dividends on the preferred stock are in arrears as of January 1, 1969. Y's direct interest in X as of January 1, 1969, is 15 percent, since Y owns 15 percent of the total combined voting power of X (30,000 of a total 200,000 votes).

Beneficial ownership of voting stock is ordinarily the test of interest in a corporation for determining whether one is a DI, but ownership of such stock is not necessarily determinative of a DI's share in earnings of an incorporated AFN for purposes of § 306 because a corporation may have two classes of stock outstanding that share equally in earnings but do not have equal voting rights. Examples in this Bulletin involving incorporated AFN's are based on the assumption that the DI's voting interest and interest in earnings of the AFN are coextensive.

(ii) *Direct interest in unincorporated business activities.* The amount of a direct interest in an unincorporated enterprise, such as a partnership or joint venture, is usually determined by the percentage share of profits to which one is entitled. If one is entitled to a fixed amount rather than a percentage of profits, or the amount is for any reason variable, the direct interest normally should be calculated by reference to the portion of profits actually distributed or distributable at the close of the most recently ended annual accounting period of the organization, assuming there was no change in the interest since that time. If neither of the foregoing rules appropriately reflects the direct interest in an unincorporated entity, the amount of direct interest should be calculated by whatever method will produce a reasonable result.

Example 2. On January 1, 1969, P, a partnership, has three partners (A, B, and C). Under the partnership agreement, A is entitled to the first $100,000 of distributed profits, and if there are additional profits, he is entitled to receive 5 percent of all such additional profits. B is entitled to 50 percent of profits after the first $100,000 up to $500,000 of total profits and to 35 percent of all profits over $500,000. C is entitled to 45 percent of profits after the first $100,000 up to $500,000 and 60 percent of all profits over $500,000. Between January 1 and December 31, 1969, P distributed $1 million to the partners. A received $145,000, B received $375,000, and C received $480,000. As of January 1, 1970, A's interest in the partnership is 14.5 percent, B's interest is 37.5 percent, and C's interest is 48 percent.

The result would be the same if no distribution were made but the profits were retained and added to the capital accounts of the partners in the same proportion.

Example 3. P and Q, two U.S. corporations, enter into a joint venture agreement for the purpose of constructing and owning an apartment house in Rome. The land on which the building is to be constructed is owned by R, an Italian national, who leases it to P and Q for a rental equal to 20 percent of the annual net rental received by P and Q from the tenants of the building. P and Q are to share equally the remaining 80 percent of net rentals received. The apartment house is an AFN of P and Q, and each has a 50 percent direct interest in the AFN.

If R were a person within the United States, the result would be the same. In addition, the real estate would be an AFN of R in which R has a 100 percent direct interest. If, however, R were not only a person within the United States but a party to the joint venture agreement, P, Q, and R would be members of an associated group (see § 905). The land, and building would be an AFN of P, of Q, and of R, in which P and Q each have a 40 percent interest and in which R has a 20 percent interest.

If Z, an Italian corporation, becomes a member of the construction joint venture and will share equally with P and Q net rentals of the apartment house after R has received his share, the apartment house would be an AFN of P and of Q, and P and Q each would have a 33⅓ percent direct interest in that AFN.

§ B902–1 Definition of indirect interest.

An indirect interest in a corporation, partnership, joint venture, trust or other entity is an interest owned through an intervening person or chain of persons. The amount of an indirect interest is calculated by multiplying together the direct interests of each person in the chain.

Example 4. DI owns 50 percent of outstanding voting stock of P, a U.S. corporation. P owns 70 percent of outstanding voting stock of C, a French corporation, while C owns 50 percent of outstanding voting stock of B, a United Kingdom corporation. DI has a 50 percent direct interest in P, a 35 percent indirect interest in C (50 percent × 70 percent), and a 17.5 percent indirect interest in B (35 percent of C's 50 percent interest).

Example 5. DI has a 17.5 percent interest in B, a United Kingdom corporation. B has a manufacturing branch in Brazil (A) and is entitled to 80 percent of the profits of C, a partnership organized under the laws of Germany. DI has a 17.5 percent indirect interest in A (17.5 percent × 100 percent) and a 14 percent indirect interest in C (17.5 percent × 80 percent).

§ B903–1 Definition of affiliate.

As defined in § 903(a), an "affiliate" of a person within the United States is any other person in which the aggregate of direct interests (defined in § 901) owned by the former person and its affiliates exceeds 50 percent. An "affiliate" may be a U.S. person or a foreign national.

Example 6. X is a U.S. corporation. X has a 51 percent direct interest in corporation Y. Y is an affiliate of X. X has a 30 percent direct interest in corporation Z, and Y has a 25 percent direct interest in Z. Z is an affiliate of X, since X and Y (affiliate of X) together have more than 50 percent direct interest in Z. The location of Y and Z is immaterial. Y has a 50 percent direct interest in corporation A. A is not an affiliate of X.

Example 7. An individual resident and citizen of the United States (P) directly owns 51 percent of outstanding voting stock of corporation A, 10 percent of voting stock of corporation C, and all voting stock of corporation Y. Corporation A directly owns 30 percent of outstanding voting stock of corporation B, and corporation B directly owns 45 percent of outstanding voting stock of corporation C. Corporation Y directly owns 60 percent of outstanding voting stock of corporation Z, and corporation Z directly owns 40 percent of outstanding voting stock of corporation B. All corporations are affiliates of P.

(i) *Consequences of being an affiliate.* A U.S. person and all U.S. affiliates constitute an "affiliated group" (see § 903 (b)). When a U.S. person has an AFN that is an "affiliate" under § 903(a), transactions between the affiliate AFN and any other AFN of the U.S. person are subject to § 505.

(ii) *Definition of affiliated group.* As defined in § 903(b), an "affiliated group" is a person within the United States and all such person's "affiliates" who are persons within the United States.

Example 8. P is an individual resident and citizen of the United States. P has a 60 percent direct interest in X, a U.S. corporation. X has a 60 percent interest in C, a French corporation. X and C are affiliates of P. P and X are an affiliated group. C is not a member

of the affiliated group, because C is not a person within the United States.

(iii) *Treatment of members of an affiliated group as a single person.* Except for purposes of an election under § 906 (b) (1), all members of an affiliated group are treated as a single person (see § 903 (c)). Consequently, the foreign balances, direct investment transactions and allowables of each member are attributed to the group. The group files a single report for each period for which a report is required, aggregating reportable items of all members of the group (see § 907 (d)). In addition, the group, as a whole, makes one election of allowables under § 502.

Example 9. Since 1963 X, a U.S. corporation, has owned 51 percent of outstanding stock of another U.S. corporation Y. X and Y are members of an affiliated group, under § 903(b). Since 1963 X has had a wholly owned subsidiary (B) in Schedule B and Y has had a 10-percent-owned subsidiary (A) in Schedule A. B is X's sole AFN and A is Y's sole AFN. During 1965–66 X made positive direct investment of $1 million in Schedule B and lent $300,000 to A. Y made positive direct investment in Schedule A of $1,300,000. X and Y, as an affiliated group, filed a single Form FDI–101 showing the following § 504(a) historical allowables (000 omitted):

Schedule A:	
Positive direct investment for 1965–66 ($1,300 plus $300)	$1,600
§ 504(a) allowable ($1,600×50%×110%)	880
Schedule B:	
Positive direct investment for 1965–66	1,000
§ 504(a) allowable ($1,000×50%×65%)	325

In 1969, X and Y elect the historical allowable of § 504 (a) and (c). X and Y make positive direct investment in Schedules A and B in an amount aggregating the amounts authorized pursuant to the foregoing calculations. Unused allowables will be available for carryforward or carryover under § 504 by the affiliated group.

Positive direct investment made during the year by X and Y will be reported on a single Form FDI–102 and Form FDI–102F.

Example 10. A, B, C, and D constitute an affiliated group. During 1965 and 1966, average end-of-month liquid foreign balances subject to § 203(c) held by each member of the group were as follows: A—$100,000; B—$50,000; C—$25,000; and D—none. The Form FDI—101 filed by the group should show an average end-of-month liquid foreign balance of $175,000 (the sum of the monthly 1965–66 averages of each member of the group).

An affiliated group may itself be a member of an "associated group", as defined in § 905, if any member of the affiliated group acts in concert with another U.S. person (not a member of the same affiliated group) in acquiring or owning an interest in a foreign national

Example 11. X is a member of an affiliated group. X enters into an agreement with an unrelated U.S. corporation, Y, pursuant to which X and Y each acquire 5 percent of the outstanding voting stock of C, a Netherlands corporation, from an unrelated foreign national. C thereby becomes an AFN both of the affiliated group and of Y.

§ B904–1 Definition of family group.

A "family group" is defined in § 904 as an individual within the United States, his spouse (unless legally separated), and all relatives of such individual or his spouse residing with such individual. As with an affiliated group, all members of a family group are deemed a single person within the United States and file one report under § 602 aggregating all foreign balances, direct investment transactions and other reportable items attributable to each member of the group. Members of a family group cannot elect to report separately (see § B907–1(iv)).

Example 12. H, a U.S. citizen and resident, lives in New York City with his wife (W) and two teenage daughters (P and Q). H and W also have two sons (R and S). R is 20 years of age, unmarried, attends undergraduate college in California, and is supported by H and W; S is 28 years of age, married, with a child of his own, is self supporting, and maintains his own home. W's grandfather (G) resides with H and W. H, R, and S each own 5 percent of outstanding voting stock of a French corporation (C). W who is wealthy in her own right, is a joint owner with her grandfather, G, of a substantial parcel of commercial real property (K) in the United Kingdom. H, W, P, Q, R, and G are members of a family group and X and K are AFNs of the group. S is not a member of the family group. The family group should file a single report under § 602 for each reporting period, aggregating the direct investment transactions during the relevant period between each member of the group and X and K.

A family group may itself be a member of an affiliated group as defined in § 903, or of an associated group as defined in § 905.

Example 13. Same facts as in Example 12, except that H owns 100 percent of outstanding voting stock of a U.S. corporation (U), and H and W each own 30 percent of outstanding voting stock of another U.S. corporation (V). The family group (i.e., H, W, P, Q, R, and G), together with U and V, constitute an affiliated group and are subject to the rules governing reporting and other obligations of affiliated groups.

Examle 14. Same facts as in Example 12. In 1969, H, a son (S), and T, an unrelated U.S. person, enter into an agreement pursuant to which each purchases 4 percent of outstanding voting stock of a Japanese corporation (J) from an unrelated foreign national for $100,000 in cash, or a total of $300,000. The family group together with S & T, are an associated group under § 905(a). J becomes an AFN of the family group as well as of S and of T, and each has made a $100,000 transfer of capital to J (Schedule B).

Example 15. A U.S. citizen and resident (X) owns all outstanding voting stock of a French corporation (C). In 1967, X establishes an inter vivos trust under New York law and contributes all stock of C to the trust. The trust beneficiaries are X's three minor children, all of whom reside with X. X and a domestic bank are cotrustees of the trust and X expressly retains the right to revoke or amend the trust without consent of the trust beneficiaries. No associated group is involved in this situation. However, X and his children are members of a family group, and the family group and the trust are members of an affiliated group. C is an AFN of the affiliated group.

§ B905–1 Definition of associated group.

An "associated group" is defined in § 905(a) as two or more persons within the United States, including individuals, legal entities, affiliated groups or family groups, if: (a) Such persons act in concert, pursuant to an express or implied agreement or understanding, to own or acquire interests in the same corporation or partnership organized under the laws of a foreign country or in the same business venture conducted within a foreign country; (b) the interests in the foreign enterprise owned or acquired are not owned or acquired through a corporation, partnership (other than a joint venture) or trust within the United States, whether or not such corporation, partnership, or trust is organized or created for the purpose of owning or acquiring the interests; and (c) the aggregate interests in the foreign enterprise owned or acquired would, if owned or acquired by one U.S. person, cause such person to be a DI.

A person owning a direct or indirect interest in a U.S. corporation or partnership is not a member of an associated group merely because the U.S. corporation or partnership directly owns an interest in a foreign enterprise.

Example 16. In 1968, three U.S. citizens and residents (A, B, and X) enter into an agreement pursuant to which they form and capitalize a Delaware corporation (D) and D purchases all outstanding voting stock of a French corporation (C) from an unrelated foreign national (N), for $300,000 in cash. A, B, and X each acquire 33⅓ percent of the voting stock of D. A, B, and X are not members of an associated group although, as a result of the purchase, C will become an AFN of each of A, B, X, and D. Unless an election under § 906(b)(1) is made with respect to D, the transfer of capital to C (Schedule C), resulting from purchase of C's stock, as well as all subsequent direct investment transactions between D and C, will be charged to and reported by D alone (see § B907–1(iii)).

Example 17. Same facts as in Example 16, except that A, B, and X do not organize D, but enter into an agreement pursuant to which each of them directly acquires 8 percent of outstanding voting stock of C from N for $100,000 in cash, or a total of $300,000. A, B, and X are members of an associated group and each will be charged with a $100,000 transfer of capital to C (Schedule C). Moreover, unless A, B, and X exercise the election provided in § 907(c)(2) to report as a group, A, B, and X will each file separate Forms FDI–102 and FDI–102F.

Example 18. In 1969, three U.S. corporations (A, B, and C) enter into a joint venture agreement for the purpose of developing and exploiting an oil concession in Iran. The agreement is made in New York and provides that it is to be governed by New York law. Under the pertinent concession agreement, the Iranian government is entitled to 50 percent of all oil produced, while A, B, and C are to share the remaining 50 percent. A, B, and C are members of an associated group; the joint venture in Iran is an AFN of each.

(i) *Acting in concert pursuant to an agreement or understanding.* An associated group exists only if two or more persons within the United States act in concert pursuant to an agreement or understanding. The agreement may be oral

or written, and an agreement may be implied from the surrounding facts and circumstances even when no express agreement is involved. The most common examples of an express agreement are a joint venture or stockholders' agreements with respect to the stock and management of the foreign enterprise involved. The mere signature, adherence to or acceptance of the articles of incorporation or bylaws of a foreign corporation will not, of themselves, be considered an express or implied agreement or understanding to act in concert within the meaning of § 905(a). The result may be different, however, if the articles or bylaws contain provisions ordinarily contained in a stockholders' agreement. Similarly, the purchase of stock of a foreign corporation by U.S. underwriters and dealers or U.S. investors in connection with a bona fide public offering, and the execution and performance of customary agreements in connection with such offering, will not, of themselves, be considered such an agreement or understanding.

Example 19. In 1969, two U.S. corporations (A and B) each acquire 30 percent of outstanding voting stock of a foreign corporation (F). Simultaneously, A and B enter into a written stockholders' agreement concerning the stock so acquired and the participation of A and B in the management of F. A and B are an associated group.

Example 20. F is a publicly owned foreign corporation. Seventy-five percent of F's outstanding voting stock is owned by foreign nationals, the remaining 25 percent being owned by U.S. citizens and residents no one of whom owns more than 2 percent. In this situation, in the absence of any facts indicating that the U.S. shareholders acted, or are acting, in concert with respect to the purchase of F's stock or the voting of such stock, or with respect to the management of F, the U.S. shareholders are not an associated group.

Example 21. In 1967, a U.S. citizen and resident (A) became interested in purchasing majority control of a foreign corporation (F). A contacted 20 other U.S. citizens and residents with a view toward inducing them to purchase stock of F as an investment. Such persons were unknown to each other, but were informed by A that he was organizing a group of U.S. investors to purchase control of F. A informed such other persons that F was being mismanaged and that with proper management F would be a very profitable venture. Thereafter, A purchased 20 percent of outstanding voting stock of F and 10 other U.S. citizens and residents contacted by A each purchased 2 percent of F's voting stock. No express written agreement was entered into among A and the other U.S. shareholders with respect to such purchase or with respect to any other matter concerning F, but each of the U.S. shareholders voted for A's nominees for directors. A and the other U.S. shareholders are an associated group.

(ii) *Aggregate 10 percent interest.* An associated group exists only if the aggregate of direct and indirect interest in the foreign enterprise acquired or owned by the U.S. persons acting in concert amounts to at least 10 percent.

Example 22. In December 1967, three U.S. citizens and residents (A, B, and C) entered into an agreement pursuant to which each purchased 3 percent of the outstanding voting stock of a foreign corporation (F). A, B, and C are not an associated group, since the aggregate of their interests in F is only 9 percent. In June 1968, in furtherance of the 1967 agreement, A, B, and C each purchased an additional 2 percent of outstanding voting stock of F. Accordingly, A, B, and C became members of an associated group in June 1968. Whether an associated group would have resulted if only one of them had purchased an additional 2 percent of the outstanding voting stock of F, and, if so, as of what date they became members of such group, would depend on all the facts and circumstances surrounding the purchase.

(iii) *Members of associated group as separate DIs.* Unlike members of an affiliated or family group, members of an associated group are not treated as a single person under the regulations. The principal effect of the associated group rule is to establish a DI-AFN relationship. Each member of an associated group is considered a separate DI in the foreign national (referred to as the "group AFN") owned by the group, with the following consequences:

Allowables must be individually elected under § 502 and calculated separately by each member of the group.

For compliance purposes (§ 201), each member of an associated group must compute direct investment during 1968 and subsequent years without reference to direct investment transactions of other members of the group. Long-term foreign borrowing by one member of an associated group may not be offset against the net transfer of capital or positive direct investment of other members of the group.

However, if two or more members of an associated group elect to be governed by § 503 or § 507, the amount of positive direct investment that they may make in group AFNs is subject to the limitations of § 905(b)(2) (i), (ii) and (iii). See § B905-1 (iv).

Foreign balances held by a member of an associated group are calculated without reference to foreign balances held by other members. Under § 905(b)(1), a U.S. person who is a DI by virtue of the associated group rules, but does not own a 10 percent or greater interest in a foreign national, is not subject to the restrictions on liquid foreign balances of § 203(c) and is not required to report such balances (see § 907(c)(1)).

Seperate reports are required from members of an associated group, unless they elect to report as a group under § 907(c)(2). However, even if the members elect to report as a group, compliance is still measured individually. Members of an associated group may be exempt from reporting on Forms FDI-101 (Base Period Report) and FDI-102 (Cumulative Quarterly Report), pursuant to the instructions to such forms, but only if the associated group as a whole would be exempt if an election under § 907(c)(2) had been made.

Example 23. In 1965, three U.S. corporations (A, B, and C) enter into an agreement pursuant to which each purchases 5 percent of the outstanding voting stock of a United Kingdom corporation (K) from an unaffiliated foreign national for $500,000 in cash, or a total of $1,500,000. The following also occurs during 1965 and 1966: A lends $200,000 to K, $50,000 of which is repaid in 1966; B sells $500,000 in merchandise to K on open account, the open account indebtedness of K to B being $300,000 at the end of 1966; C contributes $200,000 of equipment to the capital of K; during 1965 and 1966, K earns an aggregate of $3 million and pays dividends of $2 million, of which A, B, and C each receive $100,000. A, B, and C had no other AFNs during 1965 or 1966, individually or collectively. A, B, and C are an associated group and K is a group AFN of the associated group. Assuming an election to report as a group is not made under § 907(c)(2), A, B, and C will each submit a separate Form FDI-101 showing the following § 504(a)(2) historical allowables in Schedule B (000 omitted):

Corporation A:		
Purchase of stock of K		$500
Loan to K		200
Repayment by K		(50)
Share in reinvested earnings of K (5% of $3,000 earnings minus $100 dividends)		50
Total positive direct investment		700
Allowable (65% of 50% of $700)	$227.50	
Corporation B:		
Purchase of stock of K		500
Open account indebtedness		300
Share in reinvested earnings of K		50
Total positive direct investment		850
Allowable (65% of 50% of $850)	$276.25	
Corporation C:		
Purchase of stock of K		500
Contribution to capital		200
Share in reinvested earnings of K		50
Total positive direct investment		750
Allowable (65% of 50% of $750)	$243.75	

If A, B, and C had not acted in concert in acquiring the stock of K, none of them would have an historical allowable in Schedule B since a DI-AFN relationship would not have existed. Also, if A, B, and C elected to report as a group under § 907(c)(2), they would file a single Form FDI-101 showing aggregate positive direct investment of $2,300,000 in Schedule B during 1965 and 1966 and an aggregate Schedule B allowable of $747,500. However, since compliance by each member of an associated group is measured separately, the FDI-102F would have to indicate in a supplemental statement the portion of aggregate positive direct investment and the portion of the aggregate allowable allocable to each member of the group (see § B907-1(iii)).

Example 24. A, B, and C are members of an associated group, each owning 5 percent of one group AFN. A, B, and C have no other AFNs. By virtue of § 905(b)(1), A, B, and C are not required to limit their liquid foreign balances because none has the 10 percent interest necessary to be an individual DI. In 1968, A, B, and C each made positive direct investment under § 504 of $300,000, or a total of $900,000. During 1969, A, B, and C are exempt from filing quarterly reports on Form FDI-102, provided their total direct investment (negative or positive) does not exceed $1 million from January 1, 1969, through the end of any reporting period. (See General Instruction B to Form FDI-102.)

(iv) *Associated group investment under §§ 503 and 507.* Section 905(b)(2) (i) provides that positive direct investment made during any year by members of an associated group electing to be governed by § 503 is not authorized if the aggregate of direct investment by all such members of the group during the year in all group AFNs exceeds $1 million. Thus, each member of an associated group electing to be governed by § 503 must meet two separate tests: First, aggregate positive direct investment by such member in all AFNs (including, but

not limited to, group AFNs of the associated group) may not exceed $1 million; and second, aggregate direct investment in group AFNs by such member and all other members of the associated group electing to be governed by § 503 may not exceed $1 million. Positive direct investment in group AFNs by members of the associated group electing to be governed by § 504 and positive and direct investment pursuant to the incremental earnings allowable of § 506 are not included in computing direct investment for purposes of § 905(b)(2)(i).

Example 25. X, Y, and Z are members of an associated group having one group AFN. X, Y, and Z have no other AFNs. All elect § 503 for 1970 and report as follows ($000 omitted):

	Direct investment in the group AFN
X	(200)
Y	500
Z	700
Aggregate	1,000

X, Y, and Z are in compliance for 1970 under §§ 503 and 905(b)(2)(i).

Example 26. X, Y, and Z are members of an associated group, each owning a 33⅓ percent interest in a group AFN (B) in Schedule B. During 1969, X and Y elect to be governed by § 503. Z elects to be governed by § 504(a), pursuant to which he has a historical allowable of $400,000 in Schedule B. X transfers $600,000 to B; Y transfers $400,000 and Z transfers $500,000. B has losses of $300,000. All such direct investment is authorized. X and Y together have made $1 million of positive direct investment in B, an amount authorized by § 503 and § 905(b)(2)(i). Z has made positive direct investment of $400,000 ($500,000 less Z's share of B's losses ($100,000)), an amount authorized by § 504. (Z's investment is not included in applying § 905(b)(2)(i) to direct investment made by X and Y.)

Example 27. X and Y are members of an associated group with respect to a group AFN (G). X has a wholly owned AFN (A) and Y has a wholly owned AFN (B). X and Y each elect to be governed by § 503 for 1969. X makes positive direct investment of $300,000 in G and $600,000 in A. Y makes positive direct investment of $700,000 in G and $300,000 in B.

All such positive direct investment is authorized. The investment made by X in A and G ($900,000) is authorized by § 503. The investment made by Y in B and G ($1 million) is authorized by § 503. The investment made by X and Y in G ($1 million) is within the limitation of § 905(b)(2)(i).

Similarly, all members of an associated group that elect § 507 are treated as a single DI with respect to direct investment made by such members in group AFNs. (See § 905(b)(2)(ii).)

Example 28. W, X, Y, and Z are members of an associated group. They all elect § 507 for 1970 and report the following direct investment in their group AFNs ($000 omitted):

	Scheduled area	
	A	B/C
W	2,000	0
X	(1,000)	250
Y	2,000	250
Z	1,250	250
Aggregate	4,250	750

The foregoing positive direct investment is authorized by § 507, as limited by § 905(b)(2)(ii).

If § 503 is elected by some members of an associated group and § 507 is elected by others, direct investment by such members is limited by § 905(b)(2)(iii) in addition to § 905(b)(2)(i), which applies to those electing § 503, and § 905(b)(2)(ii), which applies to those electing § 507. Section 905(b)(2)(iii) limits direct investment by the members electing § 503 and § 507 to $1 million to the extent made under either § 503 or the $1 million allowable of § 507(a)(1) and (b).

Example 29. W, X, Y, and Z are members of an associated group. W and X elect § 503 for 1970 and report the following direct investment in group AFNs ($000 omitted).

	Worldwide direct investment	
W	300	
X	400	
Aggregate	700	[§ 503]

Y and Z elect § 507 and report the following direct investment in group AFNs ($000 omitted):

	Scheduled area	
	A	B/C
Y	2,000	200
Z	2,000	200
Aggregate	[1] 4,000	[2] 400

[1] Section 507(a)(2).
[2] Section 507(a)(1).

Although W and X are in compliance under § 905(b)(2)(i) and Y and Z are in compliance under § 905(b)(2)(ii), W, X, Y, and Z are out of compliance under § 905(b)(2)(iii) to the extent of $100,000, because the aggregate direct investment made under § 503 and § 507(a)(1) [$700,000 + $400,000] exceeds $1 million.

Assume that Y and Z had reported as follows ($000 omitted):

	Scheduled area	
	A	B/C
Y	2,100	50
Z	2,000	150
Aggregate	[1] 4,100	[2] 200

[1] Consisting of 4,000 [§ 507(a)(2)] and 100 [§ 507(b)].
[2] Section 507(a)(1).

W, X, Y, and Z would have been in compliance in this case under § 905(b)(2)(iii) because the aggregate of direct investment made under § 503 [$700,000], under § 507(a)(1) [$200,000] and under § 507(b) [$100,000] does not exceed $1 million.

Note that W, X, Y, and Z in this example, and in Example 28 above, must also measure compliance individually with respect to direct investment made in all of their AFNs, both group and those separately held.

(v) *Related AFNs.* Although U.S. persons acting in concert must ordinarily own or acquire an interest in the same foreign enterprise before an associated group can exist, there may be instances where ownership or acquisition of interests in different foreign enterprises by U.S. persons acting in concert will be sufficient to constitute such persons an associated group. This will be true where the businesses conducted by the different foreign enterprises involved are so related as to justify treating them as a single economic unit for purposes of the regulations.

Example 30. A Danish citizen and resident (D) owns all the stock of two Danish corporations (E and F). E is engaged in the manufacture of widgets, while F markets the widgets produced by E. The management of E and F is substantially identical. Two U.S. citizens and residents (A and B) enter into an agreement with D pursuant to which A purchases all the stock of E from D, while B purchases all the stock of F from D. A and B have an understanding that the businesses of E and F will be operated in the same integrated manner as they have in the past and that the net profits of E and F will ultimately be split equally between them. A and B are an associated group, and E and F are group AFNs of the associated group.

Example 31. Three U.S. citizens and residents (A, B, and C) enter into an agreement to establish a chain of six drive-in restaurants in continental Europe. Each restaurant is to be established as a separate foreign corporation, and A, B, and C will each own 100 percent of two such corporations. A, B, and C are an associated group, and all of the restaurant corporations are group AFNs of the associated group.

(vi) *Effect of § 505.* Under § 505, certain transfers between AFNs are treated as transfers by the transferor AFN to the DI and as further transfers by the DI to the transferee AFN. This rule applies only if either of the AFNs involved is an "affiliate" of the DI (defined in § 903(a)). An AFN is not considered an "affiliate" of the DI unless the DI (itself or together with other affiliates) owns more than 50 percent of the AFN. If, however, in the case of a group AFN of an associated group (a) no one member of the group (either itself or together with other affiliates of such member) owns more than 50 percent of the AFN, but (b) the members of the group as a whole (either themselves or together with their affiliates) own more than 50 percent of the AFN, then (c) the group AFN will be treated as an affiliate of each member of the group for purposes of § 505.

Example 32. A, B, C, and D are members of an associated group and F, a French corporation, is a group AFN of the associated group. A, B, C, and D each own 25 percent of the outstanding stock of F. F owns all outstanding stock of J, a Japanese corporation. F lends $100,000 to J on a long-term basis. F and J are considered to be affiliates individually of A, B, C, and D for purposes of § 505. Accordingly, under § 505(a)(3), F is deemed to have made a transfer of capital to A, B, C, and D in the amount of $25,000 each and A, B, C, and D are each deemed to have made a transfer of capital to J in the amount of $25,000.

If A were to own 70 percent of F's stock and B, C, and D each held 10 percent, F and J would be considered affiliates of A, but not of B, C, or D, for purposes of § 505. Accordingly, the $100,000 loan from F to J would be treated under § 505(a)(3) as a $100,000 transfer of capital from F to A, and as a further $100,000 transfer of capital from A to J.

(vii) *Reporting.* Unless an election to report as a group is made under § 907(c)(2), members of an associated group should file separate Forms FDI-101, FDI-102, and FDI-102F reflecting such member's individual direct investment trans-

actions (see § 905(b)(3)). If members of a group file separately, the FDI-102F filed by each member of an associated group should indicate on a supplemental statement the names of all other members of the associated group and the names of group AFNs. Each member of the group electing to be governed by § 503 or § 507 should submit a supplemental statement indicating the amount of his direct investment and the direct investment of the other members of the group in group AFNs.

§ B906-1 Ownership of DIs.

A U.S. person may be a DI by reason of either a direct or an indirect interest in an AFN (see § 305). For example, if A and B (U.S. corporations) each own 50 percent of C (a U.S. corporation), and C has a wholly owned AFN (X), all three corporations are DIs with respect to X. C has a 100 percent direct interest, and A and B each have a 50 percent indirect interest in X (see §§ 901 and 902). However, unless A and B elect under § 906(b)(1) to be treated separately under the regulations, C's direct investment transactions will ordinarily not be deemed to have been made by A or B (see § 906(a)). In other words, direct investment transactions between C and X will normally be charged to and reported by C alone (the owner of the direct interest in the AFN).

Example 33. A, B, C, and D each own 25 percent of E. During 1965-66 E made positive direct investment in Schedule A of $2 million, and A made positive direct investment of $800,000 in Schedule A. In addition, E maintained average end-of-month liquid foreign balances of $100,000, A maintained $50,000, and D maintained $80,000.

Absent an election under § 906(b)(1), E must file a Form FDI-101 (Base Period Report) showing $2 million of positive direct investment in Schedule A during 1965-66 and a Schedule A historical allowable of $1,100,000 ($2,000,000 × 50% × 110%). E's Form FDI-101 should also reflect base-period average end-of-month liquid foreign balances of $100,000. A would file a Form FDI-101 showing positive direct investment of $800,000 in Schedule A during 1965-66, an historical allowable of $440,000 ($800,000 × 50% × 110%) and average end-of-month liquid foreign balances of $50,000. D would file a Form FDI-101 showing only end-of-month liquid foreign balances of $80,000. B and C would not file a Form FDI-101. B, C, and D would have no Schedule A historical allowables under § 504.

If A were to own 70 percent of E and B, C, and D were each to own 10 percent, A and E would be an affiliated group. Absent an election under § 906(b)(1), A and E would file a consolidated Form FDI-101 showing $2,800,000 of positive direct investment in Schedule A, an historical allowable of $1,540,000 and liquid foreign balances of $150,000; D would file a Form FDI-101 showing only its balances; and B and C would not be required to file a Form FDI-101. B, C, and D would have no Schedule A historical allowables.

§ B906-2 Person deemed acting for or on behalf of a DI.

Under § 906(a)(2), a person within the United States owning an interest in a DI (whether or not such U.S. person is also a DI) may be deemed to be acting for or on behalf of the DI, if such person transfers funds or other property to an AFN of the DI. Application of the provisions of § 906(a)(2) to particular transactions will depend on analysis of all surrounding facts and circumstances.

§ B906-3 Election under § 906(b)(1).

Under § 906(b)(1), persons within the United States owning direct interests in a DI may, under certain circumstances, elect not to be governed by the rule set forth in § 906(a)(1). The principal effect of this provision is that, whereas direct investment transactions of and foreign balances held by a DI are not ordinarily attributable to or reportable by the stockholders or other owners of the DI, an election under § 906(b)(1) will reverse the ordinary rule and cause such direct investment transactions and foreign balances to be charged pro rata to the stockholders or other owners consenting to the election. An election once made may not be changed without the permission of OFDI.

(i) *Conditions for making election.* An election under § 906(b)(1) can be made with respect to a DI only if electing U.S. persons own, in the aggregate, a majority interest in such DI and there are not more than 10 persons (including foreign nationals) owning direct interests in the DI. If more than 10 persons own direct interests in the DI, OFDI may nevertheless permit an election if it is demonstrated, upon written application, that the election will not cause substantial administrative difficulties.

(ii) *Procedure for making election.* An election under § 906(b)(1) is made by filing a written notice thereof with the Program Reports Branch of OFDI. All persons within the United States owning direct interests in a DI must be afforded a reasonable opportunity to join in any election made with respect to such DI. Notice of such election (counterparts of which may be filed in lieu of a single instrument) must be executed by or on behalf of all persons consenting to the election and, if all U.S. persons owning direct interest in the DI do not join in the election, the notice must recite that such persons were in fact afforded a reasonable opportunity to do so.

(iii) *Effect of election.* A DI with respect to which an election is made under § 906(b)(1) is referred to as a "principal DI," while a person consenting to the election is referred to as a "consenting owner." An election under § 906(b)(1) with respect to any principal DI has the following consequences:

Each consenting owner is himself deemed a DI in every AFN of the principal DI, notwithstanding that he may not directly or indirectly own a 10 percent or greater interest in any such AFN (see § 906(b)(3)(i)). Thus, if a U.S. citizen (A) owns 5 percent of outstanding stock of a U.S. corporation (C), and C owns 100 percent of the stock of two foreign corporations (F and G), A will be a DI in both F and G if A consents to a § 906(b)(1) election, even though A's indirect interest in F and in G is merely 5 percent (and A would not otherwise be a DI under § 305). A would also be subject to the liquid foreign balance provisions of § 203(c) if he consented to an election with respect to C.

The entire amount of direct investment made and foreign balances held by the principal DI, the principal DI's share in earnings and losses of its AFNs for purposes of determining annual earnings, and total earnings and reinvested earnings under § 504(a)(3)(ii) and (b)(4) are attributed to each of the consenting owners according to their share of the direct interests in the principal DI held by all consenting owners (see § 906(b)(3)(i)). Thus, if A, B, C, and D each own 25 percent of the principal DI and all consent to an election, they will each be deemed to have made 25 percent of the principal DI's direct investment transactions. If only three consent to the election, their proportionate share would be 33⅓ percent (25 percent/75 percent) of the principal DI's direct investment transactions.

Section 504 and § 506 allowables of the principal DI are also attributed pro rata to the consenting owners. Compliance is then measured individually on the basis of the prorated allowable as well as other applicable allowables of each consenting owner. Each consenting owner may make an independent election under § 502 so that one consenting owner might elect § 504(a), another § 504(b), and another § 503 or § 507. However, the amount of positive direct investment that consenting owners electing § 503 or § 507 may make in AFNs of the principal DI is subject to the limitations of § 906(b)(3)(ii), (iii), and (iv). See § B906-2(v).

Each consenting owner files reports under § 602 showing its prorata share of all reportable items of the principal DI, as well as its own direct investment activity. An exemption from filing reports is available to consenting owners only if the principal DI would have been exempt absent the election.

Operation and effect of the foregoing principles are demonstrated in the following examples:

Example 34. A, B, C, and D each own 25 percent of E. All are U.S. corporations. E made positive direct investment in Schedule B during 1965-66 of $2 million and held average end-of-month liquid foreign balances of $80,000. A, B, C, and D consent to an election under § 906(b)(1) with respect to E. A, B, C, and D will each file a Form FDI-101 showing positive direct investment of $500,000 ($2,000,000 × 25%) in Schedule B during 1965-66, an historical allowable in Schedule B of $162,500 ($2,000,000 × 50% × 65% × 25%) and average end-of-month liquid foreign balances of $20,000 ($80,000 × 25%). A, B, C, and D will also include direct investment made and balances held by them individually during 1965-66. E will not file a Form FDI-101.

If one owner (D) does not consent to the § 906(b)(1) election, A, B, and C will each report 33⅓ percent of E's direct investment and liquid foreign balances, i.e., the direct interest of each consenting owner divided by the aggregate of direct interests of all such consenting owners.

Example 35. During 1969, A, B, and C each own 33⅓ percent of D and consent to an election under § 906(b)(1). D has an historical allowable in Schedule A of $1,200,000 and in Schedule B of zero. During 1968 D's share of annual earnings of Schedule A AFNs was $2 million and of Schedule B AFNs, $1,500,000. As a result, D has a § 504(b) earnings allowable in Schedule A of $600,000 and in Schedule B of $450,000. Should A elect to be governed by § 504(a) for 1969, A would acquire, as a result of § 906(b)(3)(i), a $400,000 historical allowable in Schedule A and zero in Schedule B. If B and C chose to be governed by the § 504(b) allowable, each would acquire an earnings allowable of $200,000 in Schedule A and $150,000 in Schedule B.

Example 36. A, B, C, and D each own 25 percent of E. E has an historical allowable

in Schedule A of $800,000. During 1969, E repays a 1967 long-term foreign borrowing (authorized borrowing under § 1002) and incurs a repayment charge under § 1003 of $2 million in Schedule A. E has no AFNs in Schedules B or C. A, B, C, and D make a § 906(b) (1) election. For 1969, A elects to be governed by § 504(a) with an historical allowable in Schedule C of $500,000, in Schedule B of $600,000, and zero in Schedule A (other than what is available as A's pro rata share of E's historical allowable). A's pro rata share of the repayment charge ($500,000) reduces A's Schedule A allowable ($200,000, derived from E by virtue of the § 906(b) (1) election) to zero, and the excess ($300,000) reduces A's allowables in Schedule C from $500,000 to $200,000 (see § 1003). The Schedule B allowable is not affected.

Consenting owners may utilize allowables passed on to them by virtue of a § 906(b) (1) election either to make individual positive direct investments in AFNs of the principal DI or in their own AFNs. However, positive direct investment by the principal DI will be charged to consenting owners on the same prorata basis as allowables are "passed on". Thus, if the principal DI makes positive direct investment in any year that exceeds the applicable allowable "passed on" to the consenting owners, such owners might be in violation of § 201.

(iv) *Election by affiliated groups.* Members of an affiliated group are deemed to be a single person under the regulations, except for purposes of making an election under § 906(b) (1) in which case they are treated as separate persons. However, the purpose of this rule is to make the § 906(b) (1) election available to members of an affiliated group, and not to break up the affiliated group.

Example 37. A, B, and C are U.S. corporations. A owns 51 percent of C and B owns 49 percent. A and C are an affiliated group. Nevertheless, A may elect under § 906(b) (1). If both A and B elect under § 906(b), A will assume 51 percent of C's direct investment position, and B will be accorded 49 percent. However, A and C are still an affiliated group and therefore will be treated as one person with respect to 51 percent of C's direct investment transactions.

Example 38. A, B, C, and D are all U.S. corporations. A owns 80 percent of D, and B and C each own 10 percent of D. B owns 100 percent of C. A and D are an affiliated group, and B and C are another affiliated group. If A, B, and C make a § 906(b) (1) election with respect to D, the A–D affiliated group will report as to 80 percent of D's direct investment and the B–C affiliated group will report as to 20 percent of D's direct investment.

(v) *Limitation on use of §§ 503 and 507 by consenting owners.* If direct owners electing under § 906(b) (1) also elect to be governed by the § 503 minimum allowable, the $1 million allowable is not divided proportionally among the consenting owners, as are the §§ 504 and 506 allowables. Instead, § 906(b) (3) (ii) provides that the aggregate of direct investment made, and deemed made, by all consenting and nonconsenting owners in AFNs of the principal DI may not exceed $1 million.

Thus, each consenting owner electing to be governed by § 503 must meet two separate tests: First, aggregate positive direct investment made by such member in all AFNs (including, but not limited to, AFNs of the principal DI) may not exceed $1 million; second, aggregate direct investment in AFNs of the principal DI by such owner and all other consenting and nonconsenting owners electing to be governed by § 503 may not exceed $1 million. (This parallels the requirements of § 905(b) (2) (i) applicable to individual members of associated groups.) In computing aggregate direct investment under § 906(b) (3) (ii), direct investment in AFNs of the principal DI by consenting owners electing to be governed by § 504 and positive direct investment made under the § 506 incremental earnings allowable are not included.

Example 39. A, B, C, and D, U.S. citizens and residents, each own a 25 percent interest in E, a U.S. corporation, and consent to an election with respect to E under § 906(b) (1). E owns all outstanding stock of foreign corporations F, G, and H. A, B, C, and D elect to be governed by § 503 for 1969. During 1969, E makes a $100,000 long-term loan to F, contributes $200,000 to capital of G, and sells $250,000 of merchandise to H on credit. F, G, and H earn an aggregate of $50,000 but pay no dividends to E. Also during 1969, A makes a long-term loan of $100,000 each to F and G, while C makes a long-term loan of $250,000 to H. E's total positive direct investment is, therefore, $600,000, of which $150,000 (25%) is allocable each to A, B, C, and D because of the election. In addition, A has made positive direct investment of $200,000 and C has made positive direct investment of $250,000. The total positive direct investment made and deemed made in all AFNs of E by A, B, C, and D is, therefore, $350,000 for A, ($150,000 plus $200,000), $150,000 for B, $400,000 for C ($150,000 plus $250,000), and $150,000 for D. To the extent that the total ($1,050,000) exceeds $1 million, A, B, C, and D are all in noncompliance.

Example 40. A, B, and C each own 33⅓ percent of D. A and B elect under § 906(b) (1). C does not consent to the election. A, B, and C each elect to be governed by § 503 for 1969. During 1969 D makes positive direct investment of $900,000. C lends $150,000 to D's AFNs. The direct investment deemed made by A and B violates the limitation of § 906(b) (3) (ii), because aggregate direct investment made and deemed made by them and the nonconsenting owner (C) in the principal DI's AFNs exceeds $1 million.

Example 41. A, B, C, and D, each owning 25 percent of E, consent to an election under § 906(b) (1) with respect to E. In addition, they all elect to be governed by § 503 for 1969. In 1969 E makes a $500,000 repayment under § 1002. By operation of § 1003, each consenting owner's § 503 allowable is reduced by $125,000 (25 percent of the total repayment charge) so that each may make only $875,000 of positive direct investment in all AFNs (including, but not limited to, AFNs of E). In addition, the aggregate direct investment made by A, B, C, and D in AFNs of E during 1969 may not exceed $500,000 (§ 906(b) (3) (ii)).

Similarly, consenting owners of a principal DI that elect § 507 are treated as a single DI with respect to direct investment made, and deemed made, by them in AFNs of the principal DI. See § 906 (b) (3) (iii). This provision is analogous to § 905(b) (2) (ii) illustrated in Example 28, above.

If § 503 is elected by some consenting owners of a principal DI and § 507 is elected by others, direct investment by such consenting owners is limited by § 906(b) (3) (iv) in addition to § 906(b) (3) (ii), which applies to those electing § 507. Section 906(b) (3) (iv) limits direct investment by all direct owners electing §§ 503 and 507 to $1 million to the extent made under either § 503 or the $1 million allowable of § 507 (a) (1) and (b). This provision is analogous to § 905(b) (2) (iii), illustrated in Example 29, above.

§ B907–1 Reporting.

Section 907 sets forth a number of rules concerning the responsibility of DIs to file base period, quarterly and annual reports under § 602.

The general rule is that all DIs must file reports unless exempt from reporting as provided by the instructions to the applicable reports or by § 907(b) (3) or § 907(c) (2). It is important to note that persons consenting to an election under § 906(b) (1), and members of an associated group, are not exempt from reporting on Forms FDI–101, FDI–102, and FDI–102F under the provisions of the instructions to such forms, unless the "principal DI" or the associated group as a whole would be exempt.

(i) *Consenting owners.* Section 907 (b) (1) provides that if a U.S. person consents to an election under § 906(b) (1) with respect to any principal DI, reports filed by such person should include such person's pro rata share (calculated as provided in § 906(b) (3) (i)) of the amount of foreign balances, direct investment and other items that the principal DI would have included in its reports had the election not been made.

Example 42. A U.S. corporation (D) owns 25 percent of U.S. corporation (E) and 40 percent of U.S. corporation (F). Elections are made under § 906(b) (1) with respect to both E and F with D and all other U.S. stockholders of E and F consenting to such elections. During 1969 E makes positive direct investment of $1 million in Schedule A and $2 million in Schedule B, while F makes positive direct investment of $500,000 in Schedule A and $300,000 in Schedule B. D also has a number of directly owned foreign subsidiaries in Schedules A and B, and D itself makes positive direct investment of $1 million in Schedule A and $800,000 in Schedule B during 1969. The Form FDI–102F filed by D for 1969 should show positive direct investment of $1,450,000 in Schedule A ($1 million plus 25 percent of $1 million plus 40 percent of $500,000) and $1,420,000 in Schedule B ($800,000 plus 25 percent of $2 million plus 40 percent of $300,000).

(ii) *Nonconsenting owners and owners of indirect interests.* Section 907(b) (2) provides that reports filed by a U.S. person should not include any direct investment or other items attributable to (a) DIs in which the U.S. person owns merely an indirect interest, or (b) DIs in which the U.S. person owns a direct interest but has not consented to an election under § 906(b) (1).

Example 43. A U.S. citizen and resident (D) owns 25 percent of a U.S. corporation (E), which in turn owns 50 percent of another U.S. corporation (F). D also owns 50 percent of U.S. corporation (G) and 40 percent of U.S. corporation (H). No elections

are made under § 906(b)(1) with respect to corporation E, F, or G. An election is made under § 906(b)(1) with respect to corporation H, but D does not consent to the election after being given a reasonable opportunity to do so. During 1969 E, F, G, and H, with various AFNs throughout the world make positive direct investment of $1 million, $500,000, $800,000 and $600,000, respectively. Also during 1969, D himself makes positive direct investment of $200,000 by cash purchase of foreign commercial real estate from an unaffiliated foreign national. The Form FDI–102F filed by D for 1969 should include his own positive direct investment of $200,000, but should not include any of the positive direct investment made by E, F, G, or H.

If D had made no positive direct investment of his own during 1969, D would not be required to file reports on Forms FDI–102 and FDI–102F for 1969.

(iii) *Associated groups.* Section 907(c)(1) provides that reports filed by a member of one or more associated groups should include all direct investment made by such person in group AFNs of the relevant associated groups. Although the general rule is that each member of an associated group files a separate report under § 602 showing his own direct investment transactions, § 907(c)(2) permits a majority in interest of an associated group to elect, subject to the approval of OFDI, to have the group file a single report showing direct investment transactions of all members of the group in all group AFNs during the relevant period. The election is made by filing a notice of election with the Program Reports Branch of OFDI, the notice being executed by or on behalf of a majority in interest of the group. Notwithstanding an election under § 907(c)(2), each member of an electing associated group having independent direct investment transactions with respect to AFNs other than group AFNs must file separate reports reflecting such transactions.

Example 44. (a) A U.S. citizen and resident (A) is a member of two different associated groups (G1 and G2). The group AFN of G1 is a French corporation (F) and the group AFN of G2 is an Australian corporation (K). A owns 5 percent of outstanding voting stock of F and 8 percent of outstanding voting stock of K. A also owns all outstanding stock of a Panamanian corporation (P). The following occurs during 1969: A contributes $100,000 to capital of K; F earns $80,000 and pays a dividend of $40,000, of which $2,000 was paid to A; K earns $200,000 and pays a dividend of $100,000, of which $8,000 is paid to A; A lends $300,000 to P on a long-term basis; P earns $50,000 and pays no dividends to A. Neither G1 nor G2 elects to report as a group. A's Form FDI–102F for 1969 should show positive direct investment of $350,000 in Schedule A (the $300,000 loan to P plus $50,000 reinvested earnings of P), positive direct investment of $108,000 in Schedule B (the $100,000 loan to K plus $8,000 reinvested earnings of K) and positive direct investment of $2,000 in Schedule C ($2,000 reinvested earnings of F).

(b) Should G2 elect, with approval of OFDI, to report as a group under § 907(c)(2), the Form FDI–102F filed by A for 1969 will not include the $108,000 of positive direct investment made by A in K (Schedule B). The FDI–102F filed by G2 will include all positive direct investment made by the members of G2 (including A's positive direct investment of $108,000) in K (Schedule B).

(c) If A does not own any stock of P, and G1 and G2 both elect, with approval of OFDI, to report as a group under § 907(c)(2), G1 will file a Form FDI–102F for 1969 showing the positive direct investment made by all members of G1 (including A's positive direct investment of $2,000) in F (Schedule C) and G2 will file a Form FDI–102F for 1969 showing the positive direct investment made by all members of G2 (including A's positive direct investment of $108,000) in K (Schedule B). A himself will not file a Form FDI–102F for 1969.

It is essential to recognize that compliance by each member of an associated group is measured separately and without reference to direct investment transactions of the group's other members, whether or not the group elects to report as a group under § 907(c)(2). The only exception to this rule is contained in § 905(b)(2), with respect to cumulation of direct investment transactions with group AFNs by members of a group electing § 503 or § 507. Accordingly, the Form FDI–102F filed by a member of the group under § 907(c)(2) should indicate, on a supplemental statement, the portion of the group's direct investment allocable to each member of the group.

(iv) *Affiliated and family groups.* Section 907(d) provides that reports filed by an affiliated or family group for any period should aggregate all direct investment transactions and other reportable items attributable to each member during the relevant period.

Example 45. A U.S. corporation (A) owns 60 percent of outstanding voting stock of another U.S. corporation (B), and 80 percent of outstanding voting stock of a third U.S. corporation (C). B owns a 70 percent interest in a U.S. partnership (P). All outstanding stock of A is owned by a U.S. citizen and resident (D). During 1969, A makes positive direct investment of $100,000, B makes positive direct investment of $200,000, C makes positive direct investment of $300,000, D makes positive direct investment of $50,000, and P makes positive direct investment of $150,000. The Form FDI–102F filed by the affiliated group of A, B, C, D, and P for 1969 should show positive direct investment of $800,000, allocated among the appropriate scheduled areas. A, B, C, D, and P need not file a separate Form FDI–102F.

Had A and all other stockholders of B made an election under § 906(b)(1) with respect to B, the Form FDI–102F filed by the affiliated group for 1969 would include only 60 percent of B's positive direct investment, rather than the entire $200,000. Total positive direct investment to be reported by the group will, therefore, be $720,000.

B1000—Subpart J (§§ 1001–1003)

§ B1000-1 Introduction.

Direct investment may be made by DIs with proceeds of long-term foreign borrowing without current charge to allowables. Repayment of a long-term foreign borrowing is a transfer of capital under § 312(a)(7) if the proceeds of such borrowing have been expended in making transfers of capital or allocated to positive direct investment. The transfer of capital under § 312(a)(7) is deemed to have been made to the scheduled area or areas where the last deduction or deductions with respect to the proceeds have been made. Furthermore, satisfaction by a DI of the debt obligation of its AFN is a transfer of capital under § 312(a)(6). Repayment by a DI either of its own long-term foreign borrowing or of an AFN borrowing may, therefore, result in positive direct investment prohibited by § 201, if such positive direct investment is in excess of the amount authorized to the DI under Subpart E. However, § 1002(a) generally authorizes positive direct investment (which may be in excess of applicable Subpart E or M allowables) attributable to transfers of capital resulting from repayment of certain borrowings enumerated therein.

The general authorization under § 1002(a) applies to: (a) Repayment of long-term foreign borrowings made prior to January 1, 1968; (b) repayment by a DI, pursuant to a guarantee, of AFN borrowings made prior to January 1, 1968; (c) repayment of AFN borrowings not guaranteed by the DI if the borrowings were made from a bank prior to January 1, 1968; and (d) repayment of AFN borrowings made from a bank after January 1, 1968, pursuant to a fixed loan commitment established by the AFN prior to that date. Section 1002(a) thus authorizes repayment of borrowings contracted prior to the effective date of the program.

Section 1002(a) also authorizes repayment by a DI of borrowings made by an AFN and guaranteed by the DI, on or after June 10, 1968, provided that the DI files, with respect to the borrowing, a certificate described in § 1002(b). In the certificate, the DI must state, in light of all facts and circumstances existing at the time of the guarantee, that it has reason to believe either that the DI will not make any repayment of the borrowing within 7 years of the guarantee, or that any positive direct investment resulting from repayment within 7 years will not exceed the amount of positive direct investment authorized by Subpart E. The section similarly authorizes repayment of a DI's own long-term foreign borrowing made on or after June 10, 1968, provided that the DI files a similar certificate with respect to the long-term foreign borrowing.

Section 1002(a) further authorizes repayment of a DI's borrowing made during the period from January 1, 1968, through June 9, 1968. During that period the predecessor of Subpart J, General Authorization No. 1, was in effect. General Authorization No. 1 authorized repayment of a DI's long-term foreign borrowing and an AFN borrowing guaranteed by the DI, conditioned upon the filing of a certificate similar to the certificate required by present § 1002(a).

Finally, § 1002(a) authorizes repayment by the DI of a long-term foreign borrowing or a borrowing by an AFN, whether or not guaranteed by the DI, if repayment occurs by issuance of stock of the DI pursuant to conversion by holders of debt obligations issued by the DI (or its AFN) in connection with the borrowing.

Although repayments pursuant to § 1002(a) are authorized independently of Subpart E or M allowables, any resulting positive direct investment has the effect of reducing such allowables. Under

§ 1003, the amount of such positive direct investment constitutes a "repayment charge" which reduces first the allowable in the scheduled area where the transfer of capital is recognized pursuant to § 312(a) (6) or (7), then the allowables in Schedules C, B, and A, in that order, and finally the allowables in future years in the same manner. Total reductions will equal the amount of positive direct investment resulting from repayment, but the charge does not reduce allowables in any scheduled area to less than zero in any year. Reduction of allowables occurs in the year in which repayment is made, except for repayment by means of conversion of debt obligations into stock of the DI, in which case the repayment charge is incurred in the following year (see § 1002(a)(3)).

Section 702 should be read in conjunction with Subpart J. This section is intended to make clear that a lender may enforce obligations entered into with DIs or AFNs, whether or not performance by the obligor is authorized by the regulations, absent the lender having actual knowledge at the time the borrowing is made that the use of the proceeds thereof, the repayment thereof, or any other transaction in connection therewith will constitute a violation by the DI of the regulations.

§ B1001–1 Definition of borrowing by a DI and by an AFN.

Section 1001(b) defines the term "borrowing by a DI" as a borrowing by a DI repayment of which would constitute a transfer of capital under § 312(a)(7), which applies to any long-term foreign borrowing (as defined in § 324), the proceeds of which have been expended in making transfers of capital or allocated to positive direct investment. Repayment of borrowings by the DI that are not long-term foreign borrowings, and repayments of long-term foreign borrowings, the proceeds of which have not been expended or allocated, do not result in transfers of capital.

Section 1001(a) defines the term "borrowing by an AFN". As is the case with a DI's long-term foreign borrowing, a "borrowing by an AFN" includes not only the typical loan of funds and sale of debt obligations, but may also include other transactions, the practical economic effect of which is that the AFN acquires an interest in property, with all or part of the payment deferred to some future date. Thus, for example, an installment purchase of property by an AFN may involve a "borrowing" for purposes of Subpart J. (See § B324–4.)

Section 1002(c)(1) provides that a borrowing by a DI or by an AFN is deemed to have been made on the date the proceeds are received by the borrower, or, if a purchase of property on credit is involved, on the date the property is purchased. If, however, the borrowing involves a public offering of securities, the borrowing is deemed to have been made on the date the securities are issued, and if the borrowing involves the use of an overdraft facility, the borrowing is deemed to have been made when the overdraft is used. The date of a borrowing is significant in determining (1) whether the borrowing, if made by a DI, qualifies as long-term foreign borrowing under § 324, and (2) whether any repayments of the borrowing are expected to be made within 7 years from the date thereof.

As is the case with respect to a long-term foreign borrowing under § 324(b)(1), the refinancing of a borrowing by an AFN, by virtue of renewal, extension or continuance thereof or a subsequent borrowing from the same or another lender, is not a repayment of the borrowing or the making of a new borrowing. (Sec 1002(e)(2).)

Delivery of equity securities of a DI to holders of debt obligations issued by an AFN, in exchange for the debt obligations of the AFN, constitutes repayment by the DI of the AFN's borrowing (a transfer of capital under § 312(a)(6) in the amount of the debt retired). Such treatment is analogous to the treatment of delivery of equity securities of a DI in exchange for the debt obligations issued in connection with a long-term foreign borrowing. (See § B324–11 regarding repayment by conversion with respect to long-term foreign borrowing.)

There are, however, some significant differences between a borrowing by an AFN (other than borrowings by an OFS covered by Subpart N) and a long-term foreign borrowing by a DI.

First, while a DI's long-term foreign borrowing must be made from a foreign person (other than a Canadian person), a borrowing by an AFN may be made from any person, including a United States or a Canadian person, so long as such person is neither an AFN of the DI nor the DI itself.

Second, expenditure or allocation of proceeds of long-term foreign borrowing by the DI will give rise to deductions from net transfer of capital and positive direct investment, under §§ 313(d)(1) and 306(e). Although neither the "borrowing by an AFN" nor a guarantee thereof by the DI constitutes a transfer of capital by the DI, investment by the AFN of funds received from its borrowing in other AFNs of the DI may result in transfers of capital under §§ 505 and 312.

Third, while repayment of a DI's long-term foreign borrowing results in a transfer of capital under § 312(a)(7), if the proceeds thereof have been expended or allocated, repayment of a "borrowing by an AFN" by the AFN will not result in a transfer of capital. Repayment of such borrowing by the DI, however, will result in a transfer of capital under § 312(a)(6) to the borrower AFN, since repayment indirectly increases the DI's debt or equity interest in the AFN.

Note that the treatment under Subpart N of an "overseas borrowing" by an AFN that qualifies as an OFS of the DI is substantially different from the normal AFN borrowing. See §§ B1401–1405.

§ B1001–2 Borrowing by a business venture AFN.

The identity of a borrower is normally ascertainable by reference to the instrument evidencing the debt obligation. However, when a borrowing transaction is purportedly entered into by a business venture AFN that is a direct branch of a DI (as described in § 304(a)(1)(ii)), identity of the actual primary obligor is difficult to ascertain. Similar difficulty is encountered when a borrowing is purportedly made by a business venture AFN that is a branch of an incorporated AFN (as described in § 304(a)(1)(iii)). Since the regulations distinguish between borrowing by a DI and borrowing by an AFN for many purposes, DIs are advised to submit transactions involving questions of this nature to OFDI for an interpretation.

§ B1001–3 Definition of guarantee.

The term "guarantee" is defined in § 1001(c). The written acknowledgement of secondary responsibility referred to in § 1001(c)(1) is confined to acknowledgements given to a bank. Such acknowledgements refer to general assurances of repayment that, in the typical case, are not intended to be legally enforceable against the DI but represent a moral commitment of the DI that the loan will be repaid.

The written guarantee, endorsement, etc., specified in § 1001(c)(2), refers to the customary legally binding commitment whereby the DI guarantees payment of principal and interest by, or collection thereof from, an AFN. It does not include subordination agreements.

The reference to "through-put" agreements, "take or pay" contracts, "keep-well" agreements and similar written agreements in § 1001(c)(3) covers certain types of financial arrangements designed to assure that the AFN will have sufficient funds to repay the relevant borrowing. Generally, a "through-put" agreement is an agreement (typically made by companies in the extractive industries) whereby the DI agrees to put certain types of raw materials through a particular processing, refining or delivery facility of an AFN, while a "take or pay" contract is a supply agreement whereby the DI contracts to pay for production made available by the AFN, whether or not the DI in fact accepts delivery. A "keep-well" agreement refers generally to an agreement whereby the DI agrees to supply sufficient funds to the AFN for working capital to enable repayment of the borrowing in question.

Section 1001(c)(4) provides that mortgages, pledges, or hypothecations of property made by a DI as security for repayment of a borrowing by an AFN will constitute a "guarantee" if the transaction does not involve a transfer of capital by the DI under § 312(a)(9). The guarantees described in § 1001(c)(2)–(4) are not limited to transactions involving banks.

Example 1. DI pledges stock of a domestic "affiliate" to a domestic bank as security for a borrowing by an AFN from such bank. The pledge constitutes a guarantee under § 1001(c)(4).

Example 2. DI pledges equity securities of foreign corporations that are not AFNs to a domestic bank as security for a borrowing by an AFN from a foreign branch of such bank. The pledge constitutes a guarantee under § 1001(c)(4).

Example 3. DI pledges a Deutsche Mark deposit in a German bank as security for a borrowing by an AFN from such bank. The pledge constitutes a transfer of capital under § 312(a)(9) and does not constitute a guarantee under § 1001(c)(4).

Example 4. DI pledges a demand deposit in a domestic bank as security for a borrowing by an AFN from a foreign branch of such bank. The pledge constitutes a guarantee under § 1001(c)(4).

The term "guarantee" includes a guarantee given by one AFN in respect of a borrowing by another AFN of the same DI, if repayment pursuant to the guarantee would result in a transfer of capital by the DI under § 505. A § 312(a)(6) transfer of capital would be charged to the DI by operation of § 505(a)(3) if the guarantor AFN that makes repayment pursuant to the guarantee is an affiliate of the DI under § 903(a).

Example 5. DI has two AFNs: A wholly owned subsidiary in Panama (P) that in turn has a wholly owned subsidiary in Sweden (S). S borrows from a foreign bank. Repayment of the borrowing is guaranteed by P. If P is called upon to repay the borrowing of S, the payment (whether made directly to the lender or to S) is deemed a transfer from Schedule A to the DI and from the DI to Schedule C, pursuant to § 505(a)(3). Any positive net transfer of capital to Schedule C attributable to the transfer deemed made by the DI will generally be authorized under Subpart J if the DI files a certificate (Form FDI–106) within 10 days after the execution of the guarantee by P.

§ B1001–4 DI's guarantee of an AFN borrowing.

Except for certain AFN borrowings from banks made prior to January 1, 1968, and those repaid through conversion into stock of the DI, § 1002(a) authorizes repayment by a DI of an AFN's borrowing only if made pursuant to DI's guarantee of such borrowing. Thus, in most cases, in order for repayment to be authorized, there must be both a "guarantee" and a "borrowing by an AFN", as those terms are defined in § 1001.

Example 6. DI's AFN arranges to borrow $1 million from a New York bank. On June 1, 1970, AFN receives $1 million from the bank and gives the bank a note in that amount, payable in 2 years, and also gives the bank a guarantee of repayment of principal and interest executed by the DI. On June 1, 1970, the AFN has made a borrowing that is guaranteed by the DI.

Example 7. On June 1, 1970, DI's AFN receives machinery purchased from an English manufacturer with a value of $1 million. Under the terms of the purchase agreement, $250,000 is payable upon receipt of the machinery, the remainder being payable in three equal annual installments of $250,000 (plus interest), commencing 1 year from date of receipt of the machinery. Upon receipt of the machinery, the AFN delivers to the seller a guarantee of repayment of principal and interest executed by the DI. On June 1, 1970, AFN has made a borrowing guaranteed by the DI.

Example 8. On June 1, 1970, DI's Schedule C AFN, pursuant to a purchase agreement previously entered into, acquires all the stock of a corporation in Schedule A for $2 million. The AFN must pay $500,000 at the closing on June 1, the remainder being payable to the selling shareholders of the foreign corporation in five equal annual installments of $300,000 (plus interest), commencing 1 year from the closing date. At the closing, the AFN delivers to the selling shareholders a guarantee of payment of the principal and interest executed by the DI. On June 1, 1970, the AFN has made a borrowing guaranteed by the DI. (Acquisition of the Schedule A corporation will result in a transfer of capital, under §§ 505 and 312(a)(1), of $2 million from the Schedule C AFN to the DI and from the DI to the Schedule A AFN. Since the borrowing is not a long-term foreign borrowing as defined in § 324(a), no deduction with respect to net transfer of capital will be received by the DI. If the DI must repay the borrowing pursuant to the guarantee, a transfer of capital to the Schedule C AFN will result under § 312(a)(6).)

Example 9. DI's AFN arranges with a group of investment banking organizations for the sale of 12-year debentures in face amount of $10 million to be dated September 1, 1970. The debentures will be guaranteed by the DI as to payment of principal, interest and premium (if any). The debentures also will be convertible into common stock of the DI. On September 5, 1970, an underwriting agreement is signed pursuant to which the debentures are to be sold to the underwriters at a discount of 3 percent and sold to the public at par. At the closing on September 25, 1970, AFN issues the debentures and receives a check from the underwriters for $9,500,000, the 3 percent discount and other underwriting commissions, fees and expenses having been deducted. On September 25, 1970, the AFN has made a borrowing of $10 million guaranteed by the DI.

Example 10. DI's Schedule C AFN (C) arranges with a group of investment banking organizations for the sale of $10 million of 12-year debentures to be dated September 1, 1970. The debentures will be guaranteed by DI as to payment of principal, interest, and premium (if any). Attached to the debentures will be warrants which may be detached after a period of 6 months from the date of issuance and which entitle the holder to purchase a certain number of shares of the common stock of DI at a specified price. The warrants are valued by DI's independent financial counsel at $750,000 (a valuation acceptable to OFDI). On September 5, 1970, an underwriting agreement is signed pursuant to which the debentures are to be sold to the underwriters at a discount of 3 percent and sold to the public at par. At the closing on September 25, 1970, C issues the debentures and receives a check from the underwriters for $9,500,000, the 3 percent discount and other underwriting commissions, fees, and expenses having been deducted. C has made a borrowing of $10 million guaranteed by the DI on September 25, 1970. On the same date DI is considered to have made a transfer of capital under § 312(a) to C in the amount of the value of the warrants ($750,000) that are attached to the debentures.

Example 11. On September 15, 1968, DI's AFN entered into a revolving credit arrangement with a foreign bank, pursuant to which AFN could borrow up to $5 million during a period ending September 15, 1975. The agreement provided that each takedown under the arrangement would be evidenced by a 180-day note, each note being renewable by its terms within the overall period of the arrangement. DI executed and delivered to the foreign bank a guarantee of payment of principal and interest of any borrowings made by the AFN pursuant to the revolving credit arrangement. On October 1, 1968, AFN took down $3 million and on February 1, 1969, it took down $2 million. AFN made a borrowing guaranteed by the DI of $3 million on October 1, 1968, and another borrowing guaranteed by the DI of $2 million on February 1, 1969.

The authorization contained in § 1002(a) is limited to repayment of a guaranteed borrowing. Payments made by a DI pursuant to guarantees of performance by its AFN of contractual obligations other than the repayment of debt are not authorized by § 1002(a).

Example 12. DI has a Schedule C AFN (C) that is engaged in the business of road construction. C enters into a contract with a foreign government for construction of a highway that must meet certain specifications. DI guarantees performance by C of the contract according to specifications contained therein. If DI is called upon to pay money to the foreign government or to transfer funds to the AFN to enable performance according to the contract specifications, the payment or transfer is not authorized by § 1002(a).

Example 13. DI has a Schedule C AFN involved in the construction business. From time to time, AFN makes bids on certain construction projects, in connection with which the AFN must file a bond that is forfeited if AFN is let a contract that it cannot perform. AFN has an arrangement with its local bank, in the form of an overdraft whereby the bank will pay any such forfeited amounts. DI has issued a guarantee of payment of principal and interest of any amounts paid by the bank pursuant to its arrangement with the AFN. If the AFN utilizes the arrangement to pay a forfeit which results in an overdraft, the AFN, at that time, will have made a borrowing guaranteed by the DI, and repayment by the DI may be authorized under § 1002(a).

Example 14. On July 1, 1969, DI's AFN entered into a 20-year charter-hire agreement with an unaffiliated foreign national (X) for a ship. The terms of the charter-hire agreement with X are construed by AFN's public accounting firm as an installment purchase under accounting principles generally accepted in the United States, and AFN treats an appropriate portion of the charter-hire payments as return of principal to X and treats the remainder as interest charges. Under the charter-hire agreement, AFN also agrees, among other things, to keep the ship in good repair, to keep it clear of any liens, and to hold X harmless from any liabilities that may arise out of the operation of the ship. At the closing, DI executes and delivers to X a guarantee of payment and performance of all of the obligations of AFN under the charter-hire agreement. At the closing, AFN has made a borrowing guaranteed by the DI in the amount of the aggregate principal portion of charter-hire payments to be made during the term of the charter-hire agreement. The DI's guarantee of any other obligations of AFN under the charter-hire agreement is not a guarantee of a borrowing by the AFN, and any payments or transfers to the AFN to enable it to perform any such obligation cannot be authorized under § 1002(a).

Renewal of a prior guarantee, or execution of a guarantee upon refinancing of a previously guaranteed AFN borrowing, is not considered to be a new guarantee unless the principal amount guaranteed is increased. Moreover, renewal of a guarantee or execution of a new guarantee with respect to an AFN borrowing that is still outstanding is not considered to be the making of a new guarantee.

Example 15. On September 1, 1968, DI's AFN entered into a revolving credit agreement with a foreign bank (X) that permitted AFN to borrow up to $2 million. The borrowing was guaranteed by DI. AFN immediately

took down the entire $2 million. On September 1, 1969, AFN makes a $2 million borrowing from another foreign bank (Y), giving Y a 3-year note in the principal amount of $2 million. The $2 million is used to repay AFN's borrowing from X. Even though DI executes a new guarantee of repayment of the 3-year note in favor of Y, DI is not considered to have made a new guarantee.

Example 16. On September 1, 1968, DI's AFN entered into a revolving credit agreement with the foreign branch of a United States bank for a period of 5 years. Under the agreement, AFN could make borrowings of up to $5 million evidenced by 180-day notes renewable by their terms. The agreement also provided that the DI guarantees repayment of each 180-day note as to the payment of principal and interest. On September 1, 1968, AFN immediately took down the full $5 million. On March 1, 1969, AFN executed new 180-day notes for the full $5 million and delivered to the bank a new guarantee of DI with respect to the new notes. DI is not considered to have made a new guarantee.

§ B1002–1 Authorization of positive direct investment attributable to repayment of certain borrowings.

Positive direct investment attributable to a DI's repayment of an AFN's borrowing is authorized by § 1002(a) if:

The borrowing was guaranteed by the DI prior to January 1, 1968 (§ 1002(a)(1);

The borrowing was guaranteed by the DI on or after January 1, 1968, but prior to June 10, 1968, and the DI complied with the certification requirements of § 2(a)(1) of General Authorization No. 1 (§ 1002(a)(1));

The borrowing was guaranteed by the DI on or after June 10, 1968, and the DI complied with the § 1002(b) certification requirements (§ 1002(a)(5));

The borrowing was obtained from a bank prior to January 1, 1968 (§ 1002(a)(2));

The borrowing was obtained from a bank on or after January 1, 1968, pursuant to a fixed loan commitment or line of credit established prior to January 1, 1968, or any renewal or extension thereof (§ 1002(a)(2)); or

The borrowing involved issuance of debt obligations by the AFN convertible into stock of the DI (the date of the borrowing being irrelevant), and repayment by the DI consists of delivery of DI's stock upon exercise of conversion rights (§ 1002(a)(3)).

Positive direct investment attributable to repayment of a DI's long-term foreign borrowing is also authorized by § 1002(a) if:

The borrowing was made prior to January 1, 1968 (§ 1002(a)(4));

The borrowing was made from January 1, 1968, through June 9, 1968, and the DI complied with the certification requirements of § 2(b) of General Authorization No. 1 (§ 1002(a)(4));

The borrowing was made on or after June 10, 1968, and the DI complied with the § 1002(b) certification requirements (§ 1002(a)(6)); or

The borrowing involved the issuance of debt obligations of the DI convertible into stock of the DI, and repayment by the DI consists of delivery of the DI's stock upon exercise of conversion rights (§ 1002(a)(3)).

Section 1002(a) authorizes not only a DI's actual repayment of the enumerated AFN borrowings, but also transfers of capital by a DI to AFNs to enable direct repayment of such borrowings.

However, § 1002(d) provides that positive direct investment by a DI is not authorized under § 1002(a) if repayment of the borrowing is made at the option of the DI. Repayment pursuant to a call or like provision vesting control of the time of repayment in the DI or an AFN, or the existence of unexercised options to renew, extend or continue the borrowing at the time of repayment, will be deemed to result in repayment at the option of the DI.

(i) *Preprogram guarantee of AFN borrowing.* Repayment by a DI of an AFN borrowing, pursuant to a guarantee made prior to January 1, 1968, is authorized by § 1002(a)(1). A transfer of capital by the DI to an AFN to enable the AFN to repay a borrowing is similarly authorized, if the borrowing was guaranteed prior to the effective date. For the purposes of § 1002(a)(1), a guarantee will be considered to have been made prior to the effective date if it was executed prior to the effective date, even though the AFN might not have actually made its borrowing until after the effective date. Renewal of such guarantee or execution of a new guarantee in connection with the same borrowing of the AFN or the refinancing thereof for which the first guarantee was executed will not be considered a new guarantee.

Example 17. DI has an AFN (C) in Schedule C. On September 1, 1967, C borrowed $300,000 from a foreign bank for a term of 3 years, repayment of the borrowing being guaranteed by DI on the same date. For 1970 DI elects § 504(a) with a zero historical allowable in Schedule C. On August 31, 1970, when the loan becomes due, DI is called upon under the guarantee to repay the loan, plus $20,000 in accrued unpaid interest, C itself being unable to make repayment. DI makes repayment as demanded. Repayment of the borrowing plus accrued interest in the aggregate of $320,000 is authorized by § 1002(a)(1) regardless of the fact that no positive direct investment is authorized to DI under Subpart E during 1970 in Schedule C.

(ii) *Repayment of AFN bank borrowing made or committed prior to January 1, 1968.* A transfer of capital is authorized if made in repayment of, or to enable an AFN to repay, a borrowing by such AFN from a bank made prior to January 1, 1968, or a borrowing by such AFN from a bank made on or after January 1, 1968, pursuant to a fixed loan commitment or line of credit established prior to such date or pursuant to any renewal or extension thereof. Such repayment is authorized, however, only if the liquid assets of the AFN are not sufficient to repay the borrowing at maturity and if the AFN has made every reasonable effort to refinance the borrowing on terms generally available to companies of similar size and financial position. If, on or after January 1, 1968, the amount of such pre-January 1, 1968, fixed loan commitment or line of credit is increased by 10 percent or more, a new fixed loan commitment or line of credit is deemed to have been established at the time of the increase in an amount equal to the amount of the increase (see § 1002(a)(2)); repayments under the new fixed loan commitment or line of credit are not authorized by § 1002(a)(2) but may, if the applicable certification requirements are complied with, be authorized by § 1002 (a)(1) or (a)(5).

If an AFN made a pre-January 1, 1968 borrowing from a bank and such borrowing was also guaranteed prior to January 1, 1968, the repayment will be generally authorized under § 1002(a)(1), rather than under § 1002(a)(2). If, however, the borrowing by the AFN was made prior to January 1, 1968, and the guarantee was made after January 1, 1968, § 1002(a)(2) will apply, unless DI, at the time of the guarantee, filed a certificate pursuant to General Authorization No. 1.

Example 18. DI has an AFN (C) in Schedule C. On September 1, 1967, C borrowed $300,000 from a foreign bank (F) for a term of 3 years. Repayment of the borrowing was not guaranteed by DI, but DI repaid the principal and accrued interest of $320,000 voluntarily on August 31, 1970, when the loan became due. At the time of such repayment, C had liquid assets which were just sufficient to meet its current operating expenses, and C had diligently, though unsuccessfully, attempted to refinance the borrowing with F and with other foreign lenders. The repayment by DI is authorized by § 1002(a)(2).

Example 19. DI has an AFN (C) in Schedule C. On December 1, 1967, C entered into a revolving credit agreement with a foreign bank (F) pursuant to which C could borrow up to $1 million over a period ending November 30, 1970. Borrowings under the agreement are to be made against notes with maturities of 90 days which can be renewed within the overall period of the agreement. On January 15, 1968, C took down the entire $1 million and the note was rolled-over until November 30, 1970, at which time the outstanding indebtedness, plus $50,000 in accrued interest, became due. At this time, C had liquid assets which were sufficient to repay only $300,000 of the amount due and C was unable, after diligent effort, to refinance the balance with F or with other foreign lenders. Accordingly, the remaining $750,000 due was paid by DI on November 30, 1970. The payment by DI to F of $750,000 is authorized by § 1002(a)(2).

Example 20. On September 1, 1967, an AFN of DI entered into a revolving credit agreement under which AFN could borrow up to $1 million, and AFN immediately took down the entire amount. On September 20, 1968, the amount available to AFN under the revolving credit agreement was increased to $1,500,000, and AFN borrowed the additional $500,000 in October 1968. As a result, a new $500,000 line of credit is deemed to have been established on September 20, 1968, and repayment by DI of any part of the additional $500,000 borrowing will not, therefore, be authorized by § 1002(a)(2) but would be authorized by § 1002(a)(5) if DI had guaranteed the additional $500,000 borrowing and had complied with the certification requirements of § 1002(b) of Subpart J.

(iii) *Repayment of AFN borrowing pursuant to guarantee made in the period January 1, 1968, through June 9, 1968.* Repayment by a DI of an AFN borrowing, pursuant to a guarantee made on or after the effective date through June 9, 1968, is authorized by § 1002(a)(1), if the DI filed a certificate described in § 2(a)(1) of General Authorization No. 1. A transfer of capital by the DI to

an AFN to enable the AFN to repay such borrowing is similarly authorized.

Section 2(a)(1) of General Authorization No. 1 required the DI to state that the DI "has no reason to believe, under existing circumstances, that the affiliated foreign national will be unable to pay or otherwise satisfy such indebtedness without resort to performance under the guarantee * * *." Although, should the DI be called upon to repay the AFN's borrowing pursuant to the guarantee, positive direct investment would be authorized by § 1002(a)(1) even if in excess of the amount authorized to the DI in the year of repayment, the Office may inquire into the good faith of the statement made by the DI in its certificate.

Example 21. DI elects to be governed by § 503 during 1969. On March 15, 1968, DI executed its guarantee of payment of principal and interest under its AFN's 1-year note in the principal amount of $2 million, executed that same day. DI filed a General Authorization No. 1 certificate, based upon the belief that AFN could renew the borrowing at the time that it came due. During 1968, the AFN exeprienced financial difficulties, the market for AFN's products diminished, and DI, at the beginning of 1969, was forced to discontinue the AFN's operations. DI therefore repaid the $2 million, pursuant to its guarantee, on the maturity date of the note. The transfer of capital in repayment resulted in positive direct investment in excess of $1 million, but the entire amount of positive direct investment attributable to repayment of the borrowing is authorized by § 1002(a)(1). Upon inquiry by the Office into the basis for DI's statement in the certificate, DI may offer as an explanation the changed circumstances which were beyond its control.

(iv) *Repayment of a long-term foreign borrowing made prior to January 1, 1968.* Repayment of a long-term foreign borrowing (other than a repayment resulting from conversions of debt into equity as described in § 1002(a)(3)) made prior to the effective date is authorized by § 1002(a)(4).

Example 22. In 1967, DI purchased all of the stock of a United Kingdom corporation from an unaffiliated foreign national. The purchase price was $5 million, $1 million being paid in cash at the closing and the balance being payable (together with interest of $480,000) 3 years from the date of closing. The $4 million balance constitutes a long-term foreign borrowing and payment of such balance in 1970 is authorized by § 1002(a)(4). Payment of the $480,000 in interest does not constitute a transfer of capital and thus does not require authorization (see § 312(c)(8)).

(v) *Repayment of a long-term foreign borrowing made in the period from January 1, 1968 through June 9, 1968.* Repayment of a long-term foreign borrowing (other than a repayment resulting from conversions of debt into equity as described in § 1002(a)(3)) made from the effective date throuh June 9, 1968, is authorized by § 1002(a)(4), provided that the DI filed a certificate described in § 2(b) of General Authorization No. 1.

Section 2(b) of General Authorization No. 1 required the DI to state that it "has reason to believe that, under existing circumstances, the borrowing will ultimately be repaid or satisfied from sources outside the United States."

Example 23. On March 15, 1968, DI made a long-term foreign borrowing from a foreign bank, the proceeds of which were $2 million. DI gave the bank its note with an original maturity of 12 months and filed a General Authorization No. 1 certificate in the belief that it could either renew the note when it became due or repay the borrowing with proceeds of another long-term foreign borrowing. DI immediately loaned all of the proceeds to a Schedule C AFN. During 1968, the AFN experienced financial difficulties, the market for AFN's products diminished and DI, at the beginning of 1969, was forced to discontinue the AFN's operations. DI was unable to renew the note or refinance the long-term foreign borrowing from another foreign lender, and DI repaid the borrowing from its funds in the United States. The transfer of capital in repayment of the borrowing resulted, at the end of 1969, in positive direct investment in excess of DI's Schedule C allowable and was authorized by § 1002(a)(4). Upon inquiry by the Office into the basis for DI's statement in the certificate, DI may offer as an explanation the changed circumstances beyond its control.

(vi) *Repayment through conversion of debt obligations into stock of DI.* Repayment by reason of the delivery of equity securities of the DI to holders of debt obligations of the DI (including an international finance subsidiary of the DI) or of debt obligations issued by an AFN, pursuant to conversion or similar rights, is authorized by § 1002(a)(3). No certificate is required to be filed in order to authorize such repayment, regardless of when the borrowing was made. A certificate must be filed, however, in order to provide authorization for cash payment of principal upon maturity of a convertible debenture offering, under § 1002(a)(5) and (6), since § 1002(a)(3) does not authorize such cash repayment.

For purposes of § 1003, a transfer of capital resulting from a repayment by conversion is deemed to have been made in year immediately following the year in which the conversion or similar rights are exercised.

Example 24. In February 1968, an international finance subsidiary of a DI sold $20 million of 12-year debentures in a public offering, the proceeds of which qualify as long-term foreign borrowing proceeds under § 324. The debentures are convertible into common stock of DI commencing 6 months from the date of issue. The proceeds of the debentures were invested in incorporated AFNs of DI in Schedule A, where DI, during 1968, was authorized under § 504 to make positive direct investment of $3 million. During 1968, DI delivered $5 million worth of its common stock (in aggregate market value at the time of delivery) to holders of the debentures as a result of the conversion of $3,500,000 in principal amount of the debentures. Such delivery resulted in a $3,500,000 repayment of the borrowing in 1968 (i.e., a transfer of capital to Schedule A during 1968 which is deemed to be made the following year for purposes of § 1003). During the same year, DI made additional positive direct investment of $3 million in Schedule A, which was authorized by § 504(a)(1). The positive direct investment resulting from delivery of the stock was authorized under § 1002(a)(3). Pursuant to § 1003, DI's Subpart E allowables are reduced by $3,500,000 in 1969.

Example 25. In November 1968, a Luxembourg AFN of DI (L) sold $20 million of 12-year debentures in a public offering. Attached to the debentures were warrants entitling the holder to purchase a certain number of shares of DI's common stock at a certain price. A holder of the warrants may also exchange a debenture, upon presentation of the warrant, for common stock of DI. DI's independent financial counsel valued the warrants at $2 million (which valuation was acceptable to OFDI), and DI recognized a transfer of capital to L in that amount in connection with issuance of the debt and warrant package. During 1969, an aggregate principal amount of $3 million of debentures was presented along with the warrants, and DI issued common stock in exchange therefor. The exchange constitutes the satisfaction of an AFN debt obligation, resulting in an additional transfer of capital under § 312(a)(6) in the principal amount of the debt surrendered ($3 million). Under § 1002(a)(3), the transfer of capital is deemed to be made in the year following exchange, so that DI's Schedule C allowable is not reduced under § 1003 until 1970.

(vii) *Guarantee made on or after June 10, 1968.* Repayment by a DI of an AFN borrowing, pursuant to a guarantee made on or after June 10, 1968, is authorized by § 1002(a)(5), provided that the DI filed a certificate described in § 1002(b). A transfer of capital by the DI to an AFN to enable the AFN to repay such borrowing is similarly authorized.

Section 1002(b) requires the DI to state that it has reason to believe either that it will make no transfers of capital in repayment of the AFN borrowing within 7 years of the date of the guarantee, or, if it does make transfers of capital in repayment of the borrowing within the 7-year period, positive direct investment resulting therefrom, if any, will be authorized by the DI's Subpart E (or M) allowable in the appropriate scheduled areas.

Example 26. During 1968, DI had § 504 historical allowables of $750,000 in Schedule B and $1,250,000 in Schedule A. DI had two AFNs in Schedule B: F and X. F had existed for a number of years and had maintained a substantial level of earnings for the past 3 years. X had been organized in 1967 and had lost money in that year, but DI expected X to break even in 1968 and perhaps have small earnings in 1969. On July 1, 1968, DI negotiated an overdraft facility for X from a foreign bank, pursuant to which X could make overdrafts of up to $1 million. The term of the facility was 1 year, and DI guaranteed repayment of any amount outstanding at the end of that year. DI filed a certificate under § 1002(b) stating that DI had reason to believe that no transfers of capital would be involved in repayment of the guaranteed borrowing, because renewal of the overdraft facility was anticipated until such time as X would have the financial resources to be able to repay the borrowing itself. DI had reason to believe that, should X not be able to repay at any time, F would be able to loan funds to X out of its substantial cash reserves.

Through the remainder of 1968, X and F encountered unprecedented business reverses, causing X to operate again at a loss, and resulting not only in a loss for F, but also necessitating substantial invasion of capital reserves. During 1968, X took down the full $1 million under the overdraft facility. During June 1969, the bank indicated that it would not renew the overdraft facility for $1 million, but only for $500,000. DI attempted and failed to secure financing from

other sources to refinance the $500,000. Therefore, on June 30, 1969, DI repaid $500,000 to the bank pursuant to the guarantee. This repayment was authorized by § 1002(a)(5), and the positive direct investment resulting therefrom had the effect, pursuant to § 1003, of reducing DI's Schedule B historical allowable for 1969 to $250,000. If OFDI should inquire into the inability of DI to perform according to its reasonable expectations at the time of filing the certificate, DI may offer the unforeseen, changed circumstances as an explanation.

(viii) *Repayment of long-term foreign borrowing made on or after June 10, 1968.* Repayment of a long-term foreign borrowing (other than a repayment resulting from conversions of debt into equity as described in § 1002(a)(3)) made on or after June 10, 1968, is authorized by § 1002(a)(6) if the DI filed a certificate described in § 1002(b).

Section 1002(b) requires the DI to state that it has reason to believe either that (a) no transfers of capital will be involved in repayment of the long-term foreign borrowing within 7 years of the date of the borrowing, or (b) if transfers of capital are made in repayment of the borrowing within the 7-year period, positive direct investment resulting therefrom, if any, will be authorized by the DI's Subpart E (or M) allowable in the appropriate scheduled area.

Example 27. On September 1, 1968, DI made a long-term foreign borrowing of $5 million from a foreign bank, giving the bank its 12-month note. DI immediately loaned the funds to its Schedule C AFN (C). Although the terms of the note did not make it renewable, DI was assured by the lender that, if there would be no material change in the DI's business and financial condition and in the prevailing money market, it would give favorable consideration to requests by the DI to roll-over the loan until August 31, 1975. Based on existing circumstances, DI did not anticipate any material adverse change in its business or financial condition and intended to request renewal to August 31, 1975. In this situation, DI filed a certificate under § 1002(b)(1). During the remainder of 1968 and in 1969, however, both C and DI suffered unexpected business reversals, and in August 1969, the lender indicated that it would renew the note only to the extent of $2,500,000. DI attempted and failed to find financing from other sources, and therefore repaid the borrowing to the extent of $2,500,000 from U.S. sources on August 31, 1969. The positive direct investment resulting therefrom is authorized by § 1002(a)(6). If OFDI inquires into the inability of DI to perform according to its reasonable expectations at the time of filing the certificate, DI may offer the unforeseen and changed circumstances as an explanation.

§ B1002–2 Standard Certificate Form FDI–106.

All certificates filed on or after June 10, 1969 must be made on Standard Certificate Form FDI–106. (Prior to June 10, 1969, the format of submission was immaterial so long as the certification contained all information and statements required by Subpart J.)

A revised Standard Certificate Form FDI–106 was issued by OFDI on August 6, 1970, applicable to all borrowings made on or after May 1, 1970. However, it is not necessary for DIs to file new certificates for borrowings certified after May 1, 1970, and before revised Form FDI–106 was issued.

The certificate must be delivered to OFDI within 10 days after the date of a borrowing by the DI, or the date of DI's guarantee of an AFN borrowing, as the case may be. For purposes of computing the 10-day period, the date of a borrowing by the DI is fixed according to the rules of § 1002(e)(1). The date of a guarantee is not simply the date on which DI executes the guarantee or when the last act necessary to complete a deposit, pledge or hypothecation has taken place. Rather, the date of the guarantee of an AFN borrowing is the first date on which both the guarantee and the borrowing are in existence, under § 1002(e)(1). Thus, if on January 1 DI executes a written repayment guarantee with respect to AFN borrowings up to $1 million and the AFN borrows only $500,000 on that date, then borrows another $500,000 on June 1, DI may file two certificates, each covering a $500,000 guarantee of an AFN borrowing, the first by January 10, and the second by June 10. Alternatively, DI could have filed a single certificate as to the full $1 million on or before January 10.

As noted above, however, if a DI executed a guarantee of an AFN borrowing prior to January 1, 1968, but the AFN did not actually borrow until after that date, OFDI will not require a certificate to have been filed in order for repayment to be authorized. Also, if a DI executed a guarantee in the period January 1 through June 9, 1968, but the AFN borrowing took place on or after June 10, 1968, the DI is not required to replace its General Authorization No. 1 certificate with a Subpart J certificate.

The following sections explain the substantive requirements of Form FDI–106 (as revised Aug. 6, 1970) except for those portions that are self-explanatory. For explanation of Form FDI–106 in effect for borrowings made prior to May 1, 1970, see 1969 General Bulletin § B1002–2.

(i) *Item I.* The certificate should be filed only by the DI (or a duly authorized representative). If an international finance subsidiary of a DI (see § 323) makes a borrowing guaranteed by the DI, the borrowing is treated as if made by the DI itself and only one certificate need be filed. A guarantee by one AFN of a borrowing by another AFN would likewise require a certificate filing only by the DI.

A DI that becomes obligated to repay long-term foreign borrowing, previously certified by another DI, in connection with an acquisition described in § 312(c)(1) must file a new Standard Certificate Form FDI–106 in order to authorize repayment of such borrowing under Subpart J. (See § B312–18.)

When a shareholder guarantees a borrowing by a principal DI, a single certificate should be filed by the principal DI on the basis of its allowable, unless the principal DI is an affiliate of the shareholder or unless the shareholder has consented to an election under § 906(b)(2). Transfers of capital pursuant to such guarantee that result in positive direct investment will reduce the principal DI's allowables as provided in § 1003. If the principal DI is an affiliate of the shareholder guaranteeing the borrowing, the member of the affiliated group filing reports under § 602 should file the certificate. (See § 907(d).) If the shareholder has consented to an election under § 906(b)(2), the shareholder (and any other consenting shareholder guaranteeing the borrowing) should file a single certificate. Positive direct investment attributable to transfers of capital made by a consenting shareholder pursuant to such guarantee will reduce the allowables of such consenting shareholder in accordance with the provisions of § 1003.

When an indirect owner guarantees borrowing by an AFN of the principal DI, the principal DI should file a single certificate, whether or not the election under § 906(b)(1) has been made, unless the principal DI is an affiliate of the shareholder. In this case, the member of the affiliated group filing reports under § 602 should file the certificate. Positive direct investment attributable to transfers of capital made pursuant to such guarantee will reduce the allowables of the principal DI.

(ii) *Item II.* DI should check the appropriate box as to whether the certificate relates to (a) "foreign borrowing", (b) a guarantee by DI (or an AFN) of a borrowing by an AFN, or (c) a guarantee by DI (or an AFN) of a borrowing by an overseas finance subsidiary governed by Subpart N. If the certificate relates to a borrowing by an AFN (or an overseas finance subsidiary) that is guaranteed by another AFN of the DI, the name of the guarantor AFN should also be included, along with the name of the borrower AFN and the country where the borrower AFN is located.

(iii) *Item IV.* In entry (a)(1), the term "credit facility" refers to an arrangement with a lender (such as a line of credit or revolving credit arrangement) whereby funds may be taken down from time to time over a specified period up to a stated maximum aggregate amount, as described in § 1002(e)(3). In such cases, a DI may file a single certificate with respect to such credit facility, instead of filing separate certificates for each borrowing by the DI or guarantee of an AFN's borrowing pursuant to the arrangement involved. (Although § 1002(e)(3) provides that a certificate with respect to a credit facility should be filed on or prior to the date of the first takedown, OFDI will treat such certificates as timely filed if they are delivered within 10 days after the first takedown.) A credit facility will be certified only when first made or at the time of its renewal. A DI must file a new certificate upon expiration of a credit facility and the execution of a new credit facility, but only to the extent that borrowings pursuant to the credit facility are not outstanding at the time of renewal. If borrowings are outstanding, the renewal of the credit facility is simply a renewal of the borrowing, and no new certificate need be filed. (The renewal or refinancing, as described in § 1002(e)(2), of a takedown under a credit facility or of an

isolated borrowing need not be certified at that time, since the renewal or refinancing is not the making of a new borrowing or guarantee of an AFN borrowing (see § 324(b)(1).)

Entry (a)(2) deals with a new borrowing or a single takedown pursuant to a credit facility if the DI did not file a certificate with respect to the entire credit facility, but is filing separately for each separate takedown pursuant to a credit facility. In a few isolated instances, however, such as where DI desires to change the statement made in a certificate or where changed or additional facts provide a more favorable basis for making a certificate, the DI may desire to file a second certificate for a single takedown under a credit facility for which a certificate has previously been filed. In that event, (a)(2) should be checked.

Example 28. On September 1, 1970, DI enters into a revolving credit arrangement with a foreign bank pursuant to which DI may borrow up to $5 million through August 31, 1974. Borrowings under the arrangement are to be made against notes with maturities of 180 days, renewable within the overall period of the arrangement. Funds borrowed under this arrangement are to be invested by DI in a Schedule A AFN, where the DI has a historical allowable of $7,500,000. DI believes, as of September 1, 1970, that positive direct investment in Schedule A in 1974, when all outstanding indebtedness will be paid in full, will not exceed $6,500,000. In this situation, DI may file a single Form FDI-106 on the basis that all repayments made within 7 years from the date of each borrowing under the revolving credit arrangement will be authorized by § 504. In completing Item IV of Form FDI-106, DI should check (a)(1), entering $5 million as the amount of the credit facility in IV(b) and September 1, 1970 as the date in IV(c).

On August 31, 1974, consider the following alternative possibilities:

(a) All borrowings made under the arrangement have been repaid in full. DI and the bank renew the revolving credit arrangement on the same terms for an additional 2-year period, ending August 31, 1976. Funds borrowed under the arrangement as renewed are also to be invested in Schedule A AFNs. In this situation, DI must file a new certificate stating the belief that all repayments made within 7 years from the date of each borrowing will be authorized by § 504. DI will check (a)(1) of Item IV and will also enter the amount of the credit facility ($5 million) and the date, August 31, 1974.

(b) The arrangement is renewed, with $5 million of borrowings under the prior arrangement still outstanding. The funds to be borrowed under the renewed arrangement are to be used to refinance the outstanding indebtedness. Since, by virtue of the provisions of § 1002(e)(2), funds borrowed under the renewed arrangement to refinance existing indebtedness will not constitute new borrowings, DI is not required to file any additional certificates because of the renewal of the arrangement.

(c) The arrangement is renewed, with $3 million of borrowings under the prior arrangement outstanding. Thus, $3 million of borrowing under the renewal will be used to refinance outstanding indebtedness, and does not constitute a new borrowing. The remaining $2 million will constiue a new borrowing, when DI takes down that amount. DI plans to invest the $2 million in the Schedule A AFN, so that DI may file a single certificate with respect to the $2 million borrowing it may make under the renewal agreement. If DI files a single certificate, entry (a)(1) should be checked. The amount of the arrangement is $5 million and the date is August 31, 1974. However, DI will certify only to $2 million of borrowings ($5 million less $3 million).

Entry (a)(3) is for a borrowing constituting a refinancing of a foreign borrowing or long-term foreign borrowing previously certified. Although a refinancing borrowing as described in § 324(b)(1) need not be certified, there may be instances when a foreign lender may insist on certification.

Entry (a)(4) should be checked if Item II (b) or (c) was checked.

Entry (b) should show the principal amount of the transaction being certified. If an offering with warrants attached is made by a DI, a certain portion of the funds or other property received from the offering will be attributable to sale of the warrants and, therefore, will not constitute proceeds of long-term foreign borrowing. In such case, the DI should indicate the value of the warrants, based upon a valuation by one or more of the principal underwriters or by DI's independent financial counsel. (OFDI reserves the right to review the reasonableness and accuracy of any such valuation.) The value of the warrants should be deducted from aggregate principal amount of the bonds or debentures, and the difference is the amount of potential repayment that must be certified. (See § 324.) If such an offer is made by an AFN of DI, attachment of warrants will not have an effect on the amount of the borrowing. However, DI must reflect, on the appropriate Form FDI-102 or Form FDI-102F, a transfer of capital from DI to AFN in the amount of the value of the warrants. The DI must certify with respect to potential repayment of the full aggregate principal amount of the debt.

Entry (c) should show the date of the transaction being certified. See § 1002(e)(1) and §§ B1001-1 and 1002-2 above.

(iv) *Item V.* DI must check the box preceding the category of § 324(a)(1) under which a borrowing qualifies as a foreign borrowing.

(v) *Item VI.* Item VI follows the structure of § 1002(b). Statement (a) restates § 1002(b)(1), and Statement (b) restates § 1002(b)(2). In order to obtain authorization to repay a borrowing described in § 1002(a) (5) or (6), a DI must make one of the two statements by checking the appropriate box opposite (a) or (b). With respect to either statement, a DI must check at least one of the boxes. If none of the premises expressly stated under Statement (a) or (b) corresponds to the particular facts of the transaction, the DI must check the box marked "Other" and write the particular reason for making the statement.

In order to make Statement (a), a DI must have reason to believe, based on all the facts and circumstances existing at the time the certificate is delivered to OFDI, that there will not be any repayment of the borrowing within 7 years of the date of the borrowing, or the date of the guarantee if the borrowing is by an AFN. For purposes of determining the 7-year period when a guaranteed borrowing by an AFN is involved, the date of the guarantee of the borrowing is considered to be the first date when both the guarantee and the borrowing by the AFN are in existence, e.g., when the guarantee has been executed and the borrowing has been taken down. As to borrowings made under a credit facility, the 7-year period is computed separately for each borrowing made under the facility.

When making Statement (a), a DI need consider only whether repayment of the borrowing can be postponed for a period of 7 years. Whether positive direct investment resulting from repayment at that time will be authorized by the DI's Subpart E allowables is irrelevant. For example, a DI that has only a § 507 allowable may make the statement with respect to a $10 million borrowing made in 1970, even though repayment in 1977 would exceed the present § 507 allowable. (When the borrowing is repaid in 1977, § 1003 requires that positive direct investment resulting from repayment will be a first charge against Subpart E allowables.) Similarly, even though a DI would be able to offset any positive direct investment (e.g., by allocating proceeds of other long-term foreign borrowing) resulting from a repayment within 7 years, DI may not certify on the basis of Statement (a). In such case, DI should use Statement (b).

Statement (b) may be made if a DI cannot make Statement (a). In order to make Statement (b) a DI must have reason to believe, based on all the facts and circumstances existing at the time the certificate is delivered to OFDI, that any repayment within 7 years of the borrowing either will not result in positive direct investment in Schedules A, B, or C, or that if such repayment does result in positive direct investment, such positive direct investment will be authorized during the year when repayment is made by the DI's Subpart E (or M) allowables in the scheduled area in which the transfer of capital under § 312(a) (6) or (7) is incurred. Upon the expiration of the 7-year period, any repayment made by DI will be authorized by § 1002, even if resulting in positive direct investment in excess of Subpart E (or M) allowables so long as DI has satisfied the conditions of Statement (b) during the 7-year period. When making such statement, a DI may assume that the §§ 503 and 507 allowables will continue to be the amount in effect during the year when the certificate is filed. Thus, a DI filing during 1970 may assume that the § 503 allowable will continue, in future years, at $1 million and that § 507 allowables will be $1 million for Schedules B and C and $4 million for Schedule A. Similarly, a DI may assume that historical allowables will continue, in future years, at the amounts set by § 504 (a) and (c) in the year of filing, that for purposes of § 504(b) earnings allowables will continue to be based on 30 percent of earnings in the appropriate prior year or years, and that the § 506 incremental earnings allowable will continue to be

computed in the same manner. On the other hand, where the transaction involved is a borrowing by an AFN with the DI's guarantee, DI must make a reasonable estimate of future AFN earnings, based on facts and circumstances existing at the time the certificate is filed.

When filing each certificate with respect to a borrowing, the DI must also take into consideration the projected use of allowables in the year when repayment falls due. For example, a DI electing to be governed by § 503 during 1970 and expecting to use the § 503 allowable through 1972 could not file certificates in 1970 containing Statement (b) with respect to two borrowings, each for $1 million and each requiring full principal repayment in 1972. Basing certification on the availability of a certain allowable in a future year, however, does not bind the DI to elect such allowable under § 502 for the year in question.

The following examples illustrate situations in which the assurances contained in Statement (a) would be appropriate:

Example 29. DI borrows $1 million from a foreign bank on September 1, 1970, giving the bank a note maturing on September 1, 1977. The DI may file a certificate under § 1002(b) by checking the box opposite Statement (a)(1) of Item VI on Form FDI–106, since no principal payments are required within 7 years.

Example 30. On September 1, 1970, DI's international finance subsidiary issues to non-Canadian foreign nationals debentures in the principal amount of $10 million, maturing on March 1, 1977. DI intends to refinance the borrowing on March 1, 1977 by making a 6-month borrowing from a foreign bank. DI may certify under § 1002(b)(1) by checking the box opposite Statement (a)(2) of Item VI on Form FDI–106, because DI believes that the borrowing can be refinanced for a total period of 7 years.

Example 31. DI's sole AFN in Schedule C borrows $1 million from a foreign bank on September 1, 1970, giving the bank its note maturing on August 31, 1972. The note is guaranteed by DI. DI has reason to believe, under existing circumstances, that the AFN will have sufficient financial resources in 1972 (generated by depreciation, earnings, and borrowings) to repay the loan and to pay all dividends required to satisfy limitations on positive direct investment imposed by the regulations. (See § 1002(c)(3).) DI may file a certificate under § 1002(b)(1) by checking the box opposite Statement (a)(3), because DI does not anticipate being called upon to make any principal repayments of the borrowing pursuant to the guarantee.

The following examples illustrate situations in which the assurances contained in Statement (b) would be appropriate:

Example 32. DI borrows $500,000 from a foreign bank in September 1970, using the proceeds to purchase all voting stock of a company in Schedule A. The borrowing is repayable in 1972, and DI does not anticipate having any allowable under § 504 or § 506 during 1972. The DI believes, under existing circumstances, that the acquired company will earn $40,000 in 1972, all of which will be reinvested, but (apart from repayment of the loan and such reinvested earnings) does not intend to make any other positive direct investment in excess of $250,000. In this situation, DI may file a certificate under § 1002(b)(2), checking Statement (b). Repayment of the $500,000 borrowing in 1972, plus the $40,000 of reinvested earnings in 1972, plus $250,000 of other positive direct investment would result in positive direct investment of $790,000 during that year, all of which would be authorized by § 503 or § 507.

Example 33. During 1970, DI has historical allowables of $400,000 in Schedule C, $5 million in Schedule B and $10 million in Schedule A. The § 504(a) historical allowable is elected and, under the upstream provision of § 504(c)(1), DI has a total allowable in Schedule C of $600,000 for 1970, based on 1969 annual earnings of DI's Schedule C AFNs of $2 million. During September 1970, DI makes long-term foreign borrowing of $1 million which will be repaid in 1972. DI intends to invest the $1 million in Schedule C AFNs. DI has reason to believe, based on existing circumstances, that the Schedule C AFNs will have annual earnings in 1971 of $4 million, giving DI a Schedule C allowable during 1972 of $1,200,000. DI further has reason to believe that the AFNs, in 1972, will reinvest no more than $200,000 of their earnings. Under these circumstances, DI may file a certificate under § 1002(b)(2), checking Statement (b) of Item VI on Form FDI–106, because there is reason to believe that repayment of the borrowing in 1972 will be authorized within the Schedule C allowable for that year. (Note that DI cannot base certification on the allowable available in Schedule B or A, even though such allowables would be reduced in 1971 (pursuant to § 1003) if the Schedule C allowable is not sufficient to absorb the charge when the debt is repaid.)

Example 34. For 1970, DI elects the historical § 504(a) allowable, with a Schedule B allowable of $1,200,000. During 1970, DI's Schedule B AFNs have earnings of $2 million, all of which DI desires to reinvest (resulting in positive direct investment of $2 million). DI makes long-term foreign borrowing in October 1970 of $800,000, which will be repaid in November 1971, and allocates the proceeds to positive direct investment in Schedule B at the end of 1970. DI has reason to believe that the AFNs in Schedule B will again have $2 million of earnings during 1971, but that they will be able to declare $800,000 of dividends. DI further plans, during 1971, to liquidate certain Schedule B holdings, which liquidation will result in a negative net transfer of capital during 1971 of $900,000. Under these circumstances, DI may file a certificate under § 1002(b)(2), checking Statement (b) of Item VI on Form FDI–106, because there is reason to believe that positive direct investment resulting from repayment of the borrowing in 1971 will be authorized under the Schedule B allowable.

§ B1002–3 Certification with respect to convertible debt.

Section 1002(c)(2) provides that, under certain circumstances, a DI may exclude potential transfers of capital resulting from conversion of debt instruments into equity securities of the DI in determining (for purposes of Subpart J) whether positive direct investment resulting from repayment will be authorized by Subpart E (or M) allowables. No certificate is required with respect to positive direct investment resulting from the conversion itself (§ 1002(a)(3)). Accordingly, § 1002(c)(2) is applicable to certification as to (i) repayment by a DI pursuant to guarantee of an AFN's convertible debt (under § 1002(a)(5)), (ii) cash repayment of a DI's convertible long-term foreign borrowing (under § 1002(a)(6)), or (iii) repayment (under § 1002(a) (1) or (4)) of a borrowing unrelated to the convertible debt at a time such debt is outstanding.

The effect of § 1002(c)(2) is that, in the stated circumstances, a DI may rely on future allowables and their availability for cash repayment of borrowings, without having to take into consideration the potential charge to such allowables resulting from a conversion. For example, if a DI which elects § 503 has made a public offering of 20-year convertible debentures in principal amount of $20 million, and subsequently makes $1 million of long-term foreign borrowing to be repaid in 5 years, a § 1002(b)(2) certificate may properly be executed as to the $1 million borrowing notwithstanding that potential conversions of the outstanding convertible debt could use up DI's § 503 allowable for the year the $1 million borrowing is repaid (assuming the conditions in the proviso to § 1002(c)(2) are satisfied).

On the other hand, if convertible debt fails to meet either of the two conditions in the proviso to § 1002(c)(2), potential conversions must be taken into account when filing certificates. If the convertible debt does not have an original maturity of 7 years, potential charges to positive direct investment resulting from conversions must be considered by the DI in determining whether sufficient allowables will exist during any year to authorize cash retirement of the convertible debt or of any other borrowing by the DI or an AFN. Similarly, potential charges against allowables must also be taken into account by the DI if a nonpublic debt issue is convertible within 3 years of the date of issuance. Potential charges against allowables resulting from conversion need not be taken into account, even if the debt is convertible within 3 years of the date of issuance, if the convertible debt is a public offering.

The term "public offering" for purposes of the second condition in the proviso to § 1002(c)(2) means generally that at least half of the issue must be distributed through normal investment banking channels abroad, or sold to foreign purchasers engaged in the business of dealing in securities, in a manner affording reasonable prospects of an effective secondary market for the securities.

If, in connection with a convertible debt issue, DI certifies under § 1002(b)(1) that no principal repayments will be made within 7 years, DI need not consider potential conversions even though the issue does not satisfy the proviso of § 1002(c)(2). However, whenever DI files a certificate under § 1002(b)(2), and convertible debt is outstanding that falls into either of the conditions of the proviso to § 1002(c)(2), potential conversions must be considered by the DI.

Example 35. DI has no § 504 allowables. In September 1968, DI purchased all stock of a Brazilian corporation from an unaffiliated foreign national (X) in exchange for a $5 million debenture issue maturing in 10 years and convertible (in whole or in part) into common stock of DI commencing 3 years from date of issuance. Interest on the debentures is payable semiannually, but in the event of default on payment of any interest installment, X has the right to declare the entire principal sum to be immediately due and payable. However, DI was in good

financial condition and did not anticipate default in interest payments. DI filed a certificate under § 1002(b)(1), since no principal repayments are required to be made within 7 years from the date of issue. (Repayment by reason of conversion would be authorized by § 1002(a)(3), without regard to the Subpart J certification requirements.) In 1970, DI desires to make long-term foreign borrowing of $4 million, to be repaid in 1972, and to allocate the proceeds thereof to positive direct investment in Schedule A. Without regard to any charge against the § 507(a)(2) allowable resulting from conversion of the debenture, DI may file a certificate with respect to the long-term foreign borrowing under § 1002(b)(2) if there is reason to believe that the entire § 507(a)(2) allowable will be available to authorize repayment in 1972.

Example 36. In 1968, DI made a public offering of $2 million principal amount of convertible debentures, maturing in 1988 and convertible after 6 months from the date of issue. The proceeds were immediately invested in Schedule C. DI filed a certificate under § 1002(b)(1) with respect to the borrowing. In 1970, DI makes a $5 million long-term foreign borrowing from a foreign bank, repayable at the rate of $1 million annually for the next 5 years, and DI allocates the proceeds thereof to Schedule C positive direct investment. In 1970, DI has a § 504(b) Schedule C allowable of $2,500,000, and has reason to believe that (except for any positive direct investment resulting from conversion of the convertible debt) repayment of the bank loan can be accomplished within this allowable over the next 5 years. (DI expects to have annual earnings of $6 million in Schedule C, to cause Schedule C AFNs to declare dividends of $4,500,000 per year, and does not expect to make any positive net transfer of capital for the next 5 years.) DI does not have to make allowance for positive direct investment resulting from potential conversions of the debenture issue when analyzing its ability to file a certificate with respect to the bank borrowing under § 1002(b)(2).

Example 37. On September 1, 1970, DI publicly offers $20 million principal amount of debentures with maturity of 25 years, convertible into stock of DI at any time after 6 months from the date of issue. The offering qualifies as long-term foreign borrowing, and DI immediately invests the proceeds in Schedule C, where DI has a historical allowable of $2 million. Under the underwriting agreement, DI must make mandatory sinking fund payments to be used by a trustee to redeem debentures in the principal amount of $1 million in each of the years 1975 through 1993. Because original maturity of the debenture issue is only 5 years, and not 7 years, consideration must be given to whether the $1 million repayment of principal that will be charged to DI's Schedule C allowable during the years 1975–77, together with potential conversions, can be made within the allowable for that schedule. While DI cannot certify under § 1002(b)(2) in these circumstances, a certificate under § 1002(b)(1) could still be executed if DI has reason to believe that any cash principal repayments or conversions in excess of the Schedule C allowable could be refinanced so that the full amount of the borrowing would have been continuously outstanding for at least 7 years.

§ B1003–1 Effect of transfers of capital in repayment of borrowings.

Section 1002 provides that positive direct investment attributable to transfers of capital in connection with repayments of certain borrowings are generally authorized, subject to § 1003. Such repayments are authorized even though positive direct investment resulting therefrom exceeds a DI's available allowables during the year of repayment. However, to the extent DI has allowables, § 1003 requires that such allowables be reduced by the amount of the repayment. (The $4 million Schedule A supplemental allowable is reduced only to the extent the loan being repaid was used in connection with direct investment in Schedule A.) If the amount repaid exceeds the allowables available in the year of repayment, the excess will be carried over and charged against allowables in succeeding years until reductions equal the amount of repayment. Accordingly, repayment of a borrowing is permitted but a DI's allowables are correspondingly reduced in the year of repayment and, if necessary, in succeeding years.

The amount of positive direct investment made by a DI under § 1002 is called the "repayment charge." The allowables elected by DI under Subpart E (and Subpart M, if applicable) are reduced, but not to less than zero, until such reductions equal the repayment charge. Of the Subpart E allowables, the § 506 incremental earnings allowable is the last to be reduced. Subpart M allowables are reduced after Subpart E allowables, unless the repayment charge is incurred in connection with the DI's foreign air transportation operations (see §§ 1301–1302), in which case the Subpart M allowable is reduced first. Reductions of § 504 allowables in Schedule C are made first to § 504 (a) and (c) or (b), (d)(3), and (f)(3)(i), and then to § 504 (e) and (f)(3)(ii).

Section 1003(c)(1) provides that Subpart E allowables are reduced first in the scheduled area where positive direct investment was made under § 1002 and, to the extent the repayment charge exceeds allowables available for that scheduled area, then in Schedules C, B and A, in that order. If Subpart E allowables are insufficient to absorb the repayment charge, Subpart M allowables are then reduced.

Section 1003(c)(5) deals with the reduction of the § 507 allowables. It provides that the $4 million Schedule A supplemental allowable (§ 507(a)(2)) will be reduced only to the extent that the DI has repaid a long-term foreign borrowing the proceeds of which were expended in Schedule A or were allocated to positive direct investment in Schedule A, or to the extent that the DI has made payments on a guarantee of a Schedule A AFN borrowing or to enable a Schedule A AFN to repay its borrowing.

To the extent that the repayment charge in any year exceeds all applicable Subpart E and M allowables, § 1003(d) provides that allowables in the following year or years are reduced in the same manner. However, a DI may elect under § 1003(d) not to have its § 507(a)(2) Schedule A supplemental allowable reduced in any year by a carryforward (from 1969 or a subsequent year) of a repayment charge attributable to Schedule A.

(i) *The repayment charge.* A repayment charge is incurred in the amount of positive direct investment resulting from transfers of capital enumerated in § 1002(a) (1)–(6), namely, (a) those to repay or enable the AFN to repay certain borrowings of the AFN; (b) those consisting of the delivery of equity securities of the DI upon conversion of certain debt obligations of the DI or an AFN; or (c) those made in repayment of long-term foreign borrowings of the DI.

Although the repayment charge is generally incurred in the year that positive direct investment is made, transfers of capital resulting from conversion of debt obligations are deemed (solely for purposes of § 1003) to occur in the year immediately following the year of conversion. (See § 1002(a)(3).)

Repayment of a long-term foreign borrowing by a DI (including delivery of equity securities upon conversion) results in a transfer of capital to the scheduled area where the proceeds were expended or allocated at the time of repayment and with respect to which a deduction was taken under § 203(d), § 306(e), or § 313(d)(1). If proceeds of the borrowing were utilized to offset positive direct investment in more than one scheduled area at the time of repayment, the transfer of capital resulting from repayment will be charged proportionally, based on the deduction taken in each scheduled area. (See § 312(a)(7).) Note that when there is repayment of a long-term foreign borrowing that was not expended or allocated, no transfer of capital will result.

Transfers of capital to repay or to enable an AFN to repay a borrowing made by by the AFN are charged against the DI's allowables in the scheduled area of the AFN.

(ii) *Reduction of allowables.* Section 1003 (c) and (d) prescribe the manner in which allowables under Subparts E and M are reduced because of a repayment charge incurred pursuant to § 1002.

A special rule applies to reduction of Schedule C allowables under § 504. Section 1003(c)(3) provides that the allowables authorizing positive direct investment in Schedule C (§ 504 (a) and (c) or (b), (d)(3), and (f)(3)(i)) are reduced before those authorizing reinvested earnings (§ 504 (e) and (f)(3)(ii)). If DI has total losses in Schedule C during the year, the amount of such losses does not constitute an allowable under § 504(e) until the following year, at which time it would be subject to reduction under § 1003.

Example 38. In 1970 DI elects § 504(b) with an allowable in Schedule C of $2 million. DI also has a carryforward from 1969 in Schedule C under § 504(d)(3) of $300,000 and a reinvested earnings allowable of $200,000 under § 504(f)(3)(ii) as a result of losses in Schedule C during 1968. During 1970 DI incurs a repayment charge of $2,400,000 in Schedule C. After making reductions as provided by § 1003(c)(3), DI will have left only $100,000 of the reinvested earnings allowable under § 504(f)(3)(ii).

A special rule also applies to U.S.-air carriers engaged in international air transportation. Section 1003(c)(4) provides that where a transfer of capital resulting in a repayment charge is primarily related to operations in foreign

air transportation (as defined in § 1302 (a)), the Subpart M allowable shall be reduced first. If the repayment charge is not related to operations in foreign air transportation, the Subpart E allowables will be reduced first, in accordance with § 1003(c)(1).

Example 39. In 1969, DI, a U.S.-flag airline, has a foreign air transport allowable of $1 million and § 504(a) allowables of $500,000 in Schedule A, $600,000 in Schedule B and $400,000 in Schedule C.

In 1969 DI repays a $1,500,000 borrowing made in connection with its operations in foreign air transportation, resulting in a repayment charge of $1,500,000 under §§ 1002 and 1003.

First, DI's foreign air transport allowable is reduced to zero and the excess of $500,000 is charged against its § 504(a) allowables in Schedules C, B, and A, in that order. Therefore, DI's Schedule C allowable is reduced to zero and its B allowable is reduced to $500,000. The $500,000 allowable in Schedule A is not affected.

Example 40. During 1969, DI repays a $1 million long-term foreign borrowing, the proceeds of which had been expended in Schedule A. Under § 1002, DI has made positive direct investment in Schedule A of $1 million constituting the "repayment charge" for purposes of § 1003. DI's allowables under § 504(a), which is elected for 1969, are $600,000 in A, $300,000 in B and $300,000 in C.

Under § 1003(c)(1), the Schedule A allowable ($600,000) is first reduced to zero; then, to the extent the repayment charge exceeds the reduction in A, the excess reduces allowables first in C (by $300,000 to zero) and then in B (by $100,000 to $200,000). Therefore, in 1969 DI may make no positive direct investment in C, no additional positive direct investment in A, and positive direct investment in B is limited to $200,000.

In 1970 the result would be the same. If DI had a § 506 incremental earnings allowable in 1970, the incremental earnings allowable would not be reduced because the DI's § 504 (a) and (c) allowables are sufficient to cover the repayment charge and § 1003 (c)(2) provides that the § 506 incremental earnings allowable is the last of the Subpart E allowables to be reduced. If, however, DI does not have a § 506 incremental earnings allowable in 1970, it would be to DI's advantage to elect the § 507 allowable for 1970. In such case, the repayment would reduce DI's Schedule A allowable under § 507(a)(2) from $4 million to $3 million, and there would be no reduction of DI's $1 million allowable in Schedule B/C.

Example 41. During 1968, DI, with allowables of $2 million in Schedule A and zero in Schedules B and C, repaid a $1 million 1967 borrowing used to acquire all outstanding shares of a German corporation. Since the "repayment charge" was incurred during 1968 (see § 1003(a)), no reduction of any allowables could be made under the applicable 1968 regulations, which did not provide (as does § 1003(c)(1) of the 1969 and 1970 regulations) for reducing allowables in other scheduled areas.

Although the $1 million repayment charge may be applied in subsequent years (under § 1003(c)(3) as in effect for 1968), only Schedule C allowables or the worldwide § 503, § 507(a)(1), or § 506 allowables may be charged.

Example 42. In 1970 DI's § 504(b) earnings allowable is $600,000 in Schedule C, $1 million in Schedule B and zero in Schedule A. DI's § 1302 (Subpart M) foreign air transport allowable is $700,000. DI also has a $200,000 § 506 incremental earnings allowable. During 1970 DI repays a long-term foreign borrowing, the proceeds of which had been expended in making a transfer of capital in the amount of $2,100,000 to construct a resort hotel in Schedule B. Assuming the repayment is authorized by § 1002, DI has incurred a repayment charge of $2,100,000 under § 1003, which first reduces DI's § 504(b) allowable in Schedules B and C to zero. DI's § 506 allowable is then reduced to zero, and the Subpart M allowable is reduced to $400,000. See § 1003 (c)(1) and (2).

The § 506 incremental earnings allowable is the last Subpart E allowable to be reduced under § 1003 (see § 1003(c)(2)).

Example 43. DI elects to be governed by § 503 in 1970 and has a § 506 allowable of $100,000. DI makes a $1,050,000 repayment under § 1002.

After the reductions under § 1003, DI has $50,000 of its § 506 allowable left. (See also Example 46 below.)

In general, all allowables (including accrued carryforwards) for the year are reduced under § 1003(c) to the extent of the repayment charge. If the repayment charge exceeds the reductions in allowables for any year, the difference is carried forward to the following year, and the same procedure for reducing allowables is repeated. (Note that carryforward of charges to the § 507(a)(2) allowable is subject to a special rule. See paragraph (iii) below.)

Example 44. DI elects § 503 in 1969 and repays a $1,500,000 borrowing, of which $900,000 had been expended in Schedule C and $600,000 in Schedule A.

In 1969, DI's § 503 allowable is reduced to zero. The remaining $500,000 repayment charge is carried to 1970.

In 1970, DI elects § 504(a) with allowables of $500,000 in Schedule A, $400,000 in Schedule B and $100,000 in Schedule C.

Since the underlying borrowing had been expended in more than one scheduled area, the repayment charge must be allocated between Schedules A and C. Accordingly, under §§ 1003 and 312(a)(7) a repayment charge of $200,000 is incurred in Schedule A (2/5× $500,000) and a repayment charge of $300,000 is incurred in Schedule C (3/5×$500,000).

The Schedule A allowable is therefore reduced by $200,000 from $500,000 to $300,000; the Schedule C allowable is reduced to zero; and the excess of $200,000 reduces the Schedule B allowable to $200,000.

(iii) *Reduction of allowables under § 507.* The § 507(a)(2) $4 million Schedule A supplemental allowable is reduced only if the repayment is related to direct investment in Schedule A. Also, if there is a carryforward of the repayment charge attributable to Schedule A, the DI may elect in the year (or years) of the carry forward not to have its § 507 (a)(2) allowable reduced.

Section 1003(c)(5) (i) and (ii) provide that the § 507(a)(2) allowable may be reduced only to the extent that the repayment is of a long-term foreign borrowing the proceeds of which were expended in or allocated to Schedule A at the time of repayment, or to the extent that the payment was pursuant to a guarantee of a Schedule A AFN borrowing or was to enable a Schedule A AFN to repay its borrowing. Unless the § 1002 transfer of capital falls within one of these categories, the Schedule A supplemental allowable will not be reduced, and the repayment charge will be absorbed entirely by the § 507(a)(1) $1 million allowable in Schedules B/C.

A repayment charge attributable to Schedule A will reduce the $4 million Schedule A supplemental allowable of § 507(a)(2) before reducing the $1 million allowable of § 507(a)(1).

Example 45. DI elected § 504(a) during 1969 with allowables of $1 million in Schedule A and $1 million in Schedule B. In 1969 DI made $7 million of positive direct investment in Schedule A and $5 million in Schedule B, calculated as provided by § 306(a). To comply with the regulations, DI made a long-term foreign borrowing of $10 million and allocated $6 million of proceeds to Schedule A and the remaining $4 million to Schedule B under § 306(e). In 1970 DI elects § 507 and repays $5 million of the borrowing. DI thus incurs a repayment charge of $3 million in Schedule A and $2 million in Schedule B, apportioned as provided by § 312(a)(7). Under § 1003, DI's allowable under § 507(a)(2) in Schedule A is reduced to $1 million by the $3 million attributable to Schedule A. The $2 million attributable to Schedule B reduces the § 507(a)(1) allowable to zero in 1970 and again in 1971.

Example 46. For 1970 DI elects § 507 and also has an incremental earnings allowable of $200,000 under § 506. DI has a repayment charge of $5,100,000 in Schedule A. Under § 1003, the $4 million allowable in Schedule A is reduced to zero; then the $1 million allowable in Schedules B and C is reduced to zero. The § 506 allowable is then reduced to $100,000.

Example 47. DI elects § 507 for 1970 and transfers $5 million to its Schedule C AFN to enable it to repay a borrowing. Under § 1003, the repayment charge will reduce DI's $1 million allowable under § 507(a)(1) to zero in 1970, but the § 507(a)(2) $4 million Schedule A allowable will not be reduced. The remaining $4 million of the repayment charge will be carried forward to future years. If DI continues to elect § 507, the $1 million § 507(a)(1) allowable for Schedules B/C will be reduced to zero in each of the 4 succeeding years.

Example 48. DI in 1970 has § 504 (a) and (c) allowables of $2 million in Schedule A, $3 million in Schedule B and $2 million in Schedule C, and a § 506 incremental earnings allowable of $1 million. During the year, DI repays a long-term foreign borrowing of $7 milion, the proceeds of which had been expended in Schedule C. If DI elects the § 504 allowables, all of DI's § 504 allowables will be reduced to zero, pursuant to § 1003 (c)(1) and (2), and the only remaining allowable will be the $1 million § 506 incremental earnings allowable. If DI elects the § 507 allowables, its § 507(a)(1) $1 million allowable for Schedules B/C will be reduced to zero, as will the § 506 $1 million incremental earnings allowable. The $5 million remaining of the repayment charge will be carried forward to future years, and the § 507(a)(2) $4 million allowable will not be reduced.

If a DI allocated proceeds of long-term foreign borrowing to positive direct investment under § 503 and elects § 507 (or § 504) in any year in which it incurs a repayment charge, the DI shall apportion the allocated amount to the appropriate schedules in the manner provided by § 306(e)(3). (See § B306-7.)

Example 49. DI elected § 503 for 1969 and reported on its annual report Form FDI-102F for the year as follows ($000 omitted):

Line 11 (Reinvested earnings)	2,000
Line 12 (Transfers of capital)	3,000
Line 13 (Use of proceeds)	4,000
Line 15 (Program direct investment)	1,000

In section VIII (Use of proceeds) of Form FDI-102F, DI reported as follows:

Line 40 (Expenditure of proceeds)	1,000
Line 41 (Allocation of proceeds under § 306(e))	3,000

The proceeds expended as reported on Line 40 were from the same borrowing as that allocated under § 306(e). The expenditures were: Schedule A—$850,000, and Schedule C—$150,000.

In 1970, DI elects § 507 and repays $2 million of the borrowing. DI must first apportion the 1969 § 306(e) deduction (line 41) to each scheduled area, in accordance with § 306(e)(3). Assume that DI recalculates positive direct investment under § 306(a) (which must include the effect of deductions under § 313(d)(1) for expended proceeds) and apportions the § 306(e) deductions as follows ($000 omitted):

	Scheduled area		
	A	B	C
(a) Direct investment under § 306(a)	1,000	2,000	1,000
(b) Proportionate share	25%	50%	25%
(c) Share of § 306(e) deduction	750	1,500	750

Therefore, DI's total deductions under §§ 306(e) and 313(d)(1) in 1969 for purposes of § 312(a)(7) are: Schedule A—$1,600,000; Schedule B—$1,500,000; and Schedule C—$900,000.

Consequently, DI's repayment of $2 million in 1970 will be charged as follows: Schedule A (40%)—$800,000; Schedules B and C (60%)—$1,200,000. Under § 1003, DI's § 507(a)(2) Schedule A allowable will be reduced by $800,000, and the § 507(a)(1) allowable will be reduced to zero with a carryforward to 1971 of a $200,000 charge against the § 507(a)(1) allowable.

There is a special rule regarding treatment of a carryforward repayment charge for DIs electing § 507. As discussed above, § 1003(c)(5) provides that in the year in which a repayment charge is incurred, the § 507(a)(2) Schedule A allowable will be reduced only to the extent that repayment is of a borrowing attributable to positive direct investment in Schedule A. Under § 1003(d), dealing with repayment charges carried forward to future years, the same rule applies, so that the § 507(a)(2) Schedule A allowable may be reduced by a carryforward repayment charge only if the repayment charge results from a borrowing attributable to positive direct investment in Schedule A. However, § 1003(d) also states that where the carryforward repayment charge is attributable to positive direct investment in Schedule A, a DI may elect not to have its § 507(a)(2) allowable reduced. The DI should indicate such election on the Annual Report Form FDI-102F filed for the year in question. (However, this election is not available for a repayment charge carried forward from 1968.) Thus, in the year in which a DI incurs a repayment charge attributable to positive direct investment in Schedule A, DI's § 507(a)(2) allowable must be reduced. But, if the repayment charge is carried forward to future years, DI may elect in those years (unless the repayment charge was incurred in 1968) not to have its § 507(a)(2) reduced. This election may be made in any year in which there is a carryforward repayment charge attributable to positive direct investment in Schedule A, even if § 507 was not elected in the year in which the repayment charge was incurred.

Example 50. DI elects § 507 for 1970 and transfers $10 million to its Schedule A AFN to enable it to repay a borrowing, as authorized by § 1002(a). The repayment charge of $10 million will reduce DI's allowable in Schedule A under § 507(a)(2) to zero. See § 1003(c)(5)(i). The remaining $6 million of the repayment charge will then reduce the § 507(a)(1) allowable in Schedules B/C to zero, and there will be a carryforward charge of $5 million to 1971. In 1971, DI may elect under § 1003(d) not to have its § 507(a)(2) allowable reduced. DI's § 507(a)(1) allowable will be reduced to zero, and DI will also have a $4 million carryforward of the repayment charge to 1972, at which time DI may again elect under § 1003(d) not to have its Schedule A supplemental allowable reduced. The § 1003(d) election is not available in the year the repayment charge is first incurred.

B1100—Subpart K (§§ 1101–1107)

§ B1100–1 Introduction.

While retaining the Schedule B classification for Canada, Subpart K permits unlimited positive direct investment in Canada and excludes direct investment in Canada from the base period and post-January 1, 1968 direct investment calculations for Schedule B. Borrowings by a DI from a Canadian person, however, do not qualify as long-term foreign borrowings under § 324.

§ B1101–1 Canadian AFNs and non-Canadian Schedule B AFNs.

Paragraph (a) of § 1101 defines a "Canadian affiliate" as an AFN in Canada, and paragraph (b) defines a "non-Canadian Schedule B affiliate" as an AFN in a Schedule B country other than Canada. The term "Canadian affiliate" should not be confused with the definition of "affiliate" in § 903(a). Thus, a "Canadian affiliate" will include a corporation organized under the laws of Canada (or any province thereof) in which the DI has a 10 percent or greater voting interest, and a partnership organized under the laws of Canada and a business venture conducted in Canada in which the direct investor has a 10 percent or greater profit interest (see §§ 304, 305, 901, and 902). Such "Canadian affiliates" are referred to in this Bulletin as "Canadian AFNs."

Example 1. DI has a wholly owned subsidiary (S) organized under the laws of Canada and a wholly owned subsidiary (T) organized under the laws of the United Kingdom. DI also owns 100 percent of an apartment house complex (U) in Canada and is a 50 percent participant in a partnership (V) organized under Canadian law engaged in the real estate business. T has an 80 percent interest in a subsidiary (X) organized under the laws of Canada, and T also has a branch sales office (W) in Montreal. S has a 60 percent interest in a subsidiary (Z) organized under the laws of Australia. S and X are incorporated Canadian AFNs of DI. T and Z are incorporated non-Canadian Schedule B AFNs of DI. U, V, and W are unincorporated Canadian AFNs of DI.

§ B1102–1 Authorized positive direct investment in Canadian AFNs.

Section 1102 authorizes a DI to make positive direct investment in Canadian AFNs in an unlimited amount during any year.

Example 2. In 1969, DI acquires all the stock of a Canadian corporation (C) from its sole stockholder, an individual citizen and resident of Germany, for $1 million in cash. The transfer of capital is made to Canada and is generally authorized under § 1102.

Example 3. In 1969, DI acquires all the stock of a German corporation (C) from an individual citizen and resident of Canada for $1 million in cash. The transfer of capital is made to Germany (Schedule C) and thus does not fall within the scope of § 1102.

Example 4. During 1969 DI purchases, for $2 million, the stock of a Canadian corporation (C) that owns a subsidiary (A) located in Panama. This transaction results in a transfer of capital both to Canada (authorized under § 1102) and to Schedule A. The purchase price must be apportioned between C and A in a manner that will fairly reflect the relative values of the interests acquired in the two corporations (such as relative book value, relative price/earnings ratios, etc.).

Example 5. In 1969, DI acquires, for $1 million in cash, all the stock of a German corporation (C) from a Canadian corporation in which DI has a 10 percent voting interest. The transfer of capital is made to Canada and is generally authorized under § 1102.

Example 6. In 1969, DI acquires, for $1 million in cash, all the stock of a German corporation (C) from a Lebanese corporation (A) in which DI has a 10 percent voting interest. C has a wholly owned Canadian subsidiary. DI has made a $1 million transfer of capital to Schedule A, and no apportionment is made since the acquisition is from another AFN.

The authorization for unlimited positive direct investment in Canada does not constitute an exemption from the reporting requirements of § 602. Accordingly, even DIs with only Canadian AFNs are nevertheless required to file Forms FDI-101, FDI-102, and FDI-102F (or FDI-102F/S), absent an exemption from reporting.

(i) *Calculation of positive direct investment in Canada (§§ 1103–1104).* Although Canada is technically a Schedule B country, the direct investment in Canadian AFNs is excluded from the calculation of direct investment in Schedule B during the base period years and during 1968 and succeeding years. Accordingly, § 1103 (a) and (b) provide that in computing a DI's net transfer of capital to all AFNs in Schedule B during any year under § 313(c), the only factors considered are transfers of capital between the DI and incorporated non-Canadian Schedule B AFNs and the DI's share of the aggregate net change in net assets of unincorporated non-Canadian Schedule B AFNs. Similarly, § 1104 provides that, in determining a

DI's share in reinvested earnings of incorporated AFNs in Schedule B during any year, only the DI's share in reinvested earnings of incorporated non-Canadian Schedule B AFNs is taken into account.

In calculating positive direct investment, Canada is treated, in effect, as being in its own separate scheduled area. For example, a transfer of capital by an incorporated Canadian AFN to an incorporated United Kingdom AFN is treated under § 505(a)(3) as a transfer of capital to the DI from Canada in calculating positive direct investment in Canadian AFNs and as a transfer of capital from the DI to Schedule B in calculating positive direct investment in non-Canadian Schedule B AFNs; if the transferee AFN is in Schedule A or Schedule C, the transfer of capital from the DI would be charged to Schedule A or C, respectively.

Similarly, in calculating a DI's share of an incorporated Canadian AFN's reinvested earnings, Canada is also treated as a separate scheduled area. Consequently, the gross amount of a dividend paid by a Canadian AFN to a non-Canadian AFN effectively reduces the DI's share in reinvested earnings of all incorporated AFN's in Canada, while the net amount of the dividend (i.e., net of foreign withholding taxes) effectively increases the DI's share in reinvested earnings of all incorporated AFNs in the payee's scheduled area.

The provisions of § § 1103 and 1104 are thus designed to permit computation of direct investment separately for Canada, Schedule A, Schedule B (excluding Canada) and Schedule C. Such provisions are also designed, in conjunction with § 505, to prevent Canadian AFNs from being used as a "pass-through" for direct investment in foreign countries other than Canada.

Example 7. DI owns an incorporated AFN (X) in Canada and another incorporated AFN (B) in the United Kingdom. In 1969, B makes a 3-year loan to X in the amount of $500,000. Under § 505(a)(3), B is treated as having made a $500,000 transfer of capital to DI, thereby reducing DI's net transfer of capital to incorporated AFNs in Schedule B in 1969 by $500,000, and DI is treated as having made a transfer of capital in the same amount to X, thereby increasing DI's net transfer of capital to incorporated Canadian AFNs in 1969 by $500,000. All resulting positive direct investment in Canada is authorized by § 1102. If the loan had been from X to B, the DI would be deemed to have made a $500,000 transfer of capital to B.

Example 8. DI has branch sales operations in Canada (X) and Australia (B), and no other AFNs in Schedule B. In 1969 X's net assets increase by $150,000 and B's branch assets increase by $400,000. DI's net transfer of capital to B in 1969 is $400,000. DI's net transfer of capital to X during 1969 is $150,000.

Example 9. DI has a wholly owned subsidiary in Canada (X) and a wholly owned subsidiary in Japan (B). In 1969 X has earnings of $50,000 and B has earnings of $100,000. X pays a dividend of $25,000 to DI. B pays no dividend. DI's share in reinvested earnings of incorporated non-Canadian Schedule B AFN is $100,000, the earnings and dividend paid by X not being taken into account. DI's share in reinvested earnings of the incorporated Canadian AFN is $25,000.

Example 10. DI has a wholly owned subsidiary in Canada (X) that, in turn, has a wholly owned subsidiary in the United Kingdom (B). During 1969 X earns $500,000 and pays a dividend of $400,000 to DI; B earns $500,000 and pays a dividend of $300,000 to X. DI's share in reinvested earnings of B is $200,000 and in reinvested earnings of X is $400,000 (the $400,000 dividend paid by X is reduced by the $300,000 dividend received from B).

The exemption provided in § 505(b) for short-term trade credits extended by one AFN to another does not apply if either of the AFNs involved in the transaction is a Canadian AFN (see § 1103(c)). Therefore, if a wholly owned Canadian AFN extends a 6-month trade credit of $100,000 to a French AFN on September 1, 1969, the transaction results in a $100,000 transfer of capital from the Canadian AFN to the DI, and a $100,000 transfer of capital from the DI to the French AFN. Similarly, if the French AFN extends a 6-month trade credit of $100,000 to the Canadian AFN, the transaction results in a $100,000 transfer of capital from the French AFN to the DI, and a $100,000 transfer of capital from the DI to the Canadian AFN.

§ B1105–1 Canadian foreign balances.

Section 1105 provides generally that, for purposes of § 203(c), "Canadian foreign balances" shall not be included in computing a DI's average end-of-month liquid foreign balances. Accordingly, the regulations do not restrict the amount of liquid foreign balances held by a DI in Canada, and the amount of Canadian foreign balances are excluded for purposes of calculating the $25,000 exemption under § 203(c)(2).

"Canadian foreign balances" are defined in § 1105(a) to include: (a) Money on deposit in a Canadian bank (as defined in § 1101(c)), including fixed interest deposits, without regard to the currency deposited and without regard to the terms of such deposits; and (b) negotiable instruments, nonnegotiable instruments and commercial paper of Canadian persons.

The term "Canadian bank," as defined in § 1101(c), includes Canadian branches and offices within Canada of banks organized outside Canada and banks organized under the laws of Canada or of any province of Canada; the term does not include offices of Canadian banks located outside Canada.

§ B1106–1 Long-term foreign borrowing from Canada.

Section 1106 provides, in general, that a DI's borrowing from a Canadian person, whether before or after January 1, 1968, cannot be a "long-term foreign borrowing," as defined in § 324.

A "Canadian person" is defined in § 1101(d) as an individual resident of Canada, a Canadian bank, or a corporation or other entity (other than a bank) organized under the laws of Canada or any political subdivision thereof. The term "Canadian person" includes foreign branches of Canadian corporations (other than Canadian banks), and also includes pension, profit-sharing and other similar trusts organized under or governed by the laws of Canada or any political subdivision thereof. For example, the pension fund of a Canadian corporation and the London branch of a Canadian insurance company are each considered a "Canadian person."

(i) *Public offerings prior to April 1, 1968.* A borrowing prior to April 1, 1968, involving the public offering of a DI's instruments of indebtedness is considered long-term foreign borrowing for purposes of § 324 if less than 25 percent of the aggregate principal amount of such instruments was sold to "Canadian persons" during the original offering. In the event 25 percent or more of the aggregate principal amount of such debt instruments was sold to Canadian persons during the original offering, the portion proved by the DI (to the satisfaction of OFDI) to have been sold to non-Canadian and non-U.S. persons will be considered a long-term foreign borrowing for purposes of § 324.

Example 11. On March 1, 1968, DI organized an international finance subsidiary (IFS) (see § 323) in the United States for the principal purpose of borrowing funds from nonaffiliated foreign nationals and investing such funds in debt or equity securities of AFNs. On March 15, 1968, IFS made a public offering outside the United States of $50 million in 20-year convertible debentures, $10 million of which were purchased by Canadian persons for investment. The entire $50 million constitutes proceeds of long-term foreign borrowing.

Example 12. If $15 million of the foregoing debentures had been purchased by a Canadian insurance company for investment during the original offering, only the remaining $35 million would constitute proceeds of a long-term foreign borrowing.

Example 13. If, in Example 12, in addition to the $15 million purchased by the Canadian insurance company, $5 million of the debentures had been acquired by a Canadian nominee of a person within the United States during the original offering, only $30 million of the proceeds would constitute proceeds of a long-term foreign borrowing.

(ii) *Public offerings on or after April 1, 1968.* A borrowing on or after April 1, 1968, involving the public offering of a DI's instruments of indebtedness is considered a long-term foreign borrowing in its entirety if such instruments are sold through underwriters in accordance with agreements limiting such sales to persons other than Canadian or U.S. persons, and if the borrowing otherwise qualifies under § 324. It should be noted that sales to Canadian underwriters or securities dealers for resale to non-Canadian and non-U.S. persons will not disqualify the borrowing from being treated in its entirety as a long-term foreign borrowing. Similarly, sales to Canadian agents or fiduciaries acting on behalf of non-Canadian and non-U.S. persons will not affect the status of the borrowing under § 324.

Following is an example of a provision in the agreement between the DI and Canadian underwriters that would be considered acceptable by OFDI for purposes of preserving the long-term foreign borrowing status of an offering:

Each Underwriter [agrees] [has agreed] that it will not directly or indirectly sell any Debentures to Canadian persons except for (i) sales to Underwriters or securities dealers who are Canadian persons but who agree that they are purchasing Debentures as principals for resale to persons who are not Canadian or United States persons, and (ii) sales to agents or fiduciaries who are Canadian persons but who are acting for the benefit of persons who are not Canadian or United States persons. For the purpose of this paragraph, a Canadian person includes an individual who is a resident of Canada, a corporation, pension, profit-sharing or other trust or other entity (other than a bank) organized under or governed by the laws of Canada or any political subdivision thereof (including the foreign branch of any Canadian corporation other than the foreign branch of a Canadian bank), and any branch or office within Canada of any of the following: Any bank or trust company organized under the banking laws of Canada or any province thereof, or any private bank or banker subject to supervision and examination under the banking laws of Canada or any province thereof.

B1300—Subpart M (§§ 1301–1303)

§ B1300–1 Introduction.

Subpart M applies to direct investment activities of DIs that are U.S.-flag air carriers, including scheduled and supplemental air carriers and air taxi operators.

Under § 1301, such DIs may elect to exclude from transfers of capital the transfer to foreign inventory of certain categories of equipment related to the DIs' operations in foreign air transportation.

Sections 1302 and 1303 provide a 30 percent foreign air transport earnings allowable for U.S.-flag air carrier DIs electing to be governed by § 504, based upon financial reports required by the Civil Aeronautics Board with respect to U.S.-flag carriers' international and territorial operations.

§ B1301–1 Exclusions from transfers of capital.

Under § 1301, a U.S.-flag air carrier may elect to exclude from net transfers of capital (as determined under § 313) any increases in certain equipment accounts of incorporated or unincorporated AFNs: *Provided*, That the equipment is necessary to the carrier's own operations in foreign air transportation, as distinguished from any separate operations in air transportation of an AFN or the operations of third persons to whom the DI or an AFN may be providing support or selling parts and services. If the election is made, related charges for depreciation or other expenses must also be excluded in determining earnings of the AFNs.

A DI electing under this section must do so with respect to all applicable AFNs in all scheduled areas. Once made, the election is thereafter binding on the DI and may not be changed for subsequent years without permission from OFDI.

§ 1302–1 Earnings allowable for foreign air transport operations.

Section 1302 authorizes U.S.-flag air carriers to make positive direct investment, in connection with their foreign air transport operations, of up to 30 percent of aggregate annual foreign air transport earnings for the immediately preceding year. The § 1302 allowable is not subject to schedular limitations, but it may be used only for positive direct investment that is primarily related to the DI's own operations in foreign air transportation.

Section 1302 applies automatically to foreign air transport operations of any DI that elects to be governed by § 504 for the year involved. If § 1302 is applicable, both transfers of capital related to the DI's foreign air transport operations and aggregate annual foreign air transport earnings will be excluded from the computation of DI's allowables under § 504 (a) or (b).

A U.S.-flag air carrier's choices are, therefore, as follows:

The § 503 or § 507 allowable for all operations;

An adjusted § 504(a) historical allowable for all operations plus a § 1302 allowable for foreign air transport operations only; or

An adjusted § 504(b) earnings allowable for all operations plus a § 1302 allowable for foreign air transport operations only.

(i) *Aggregate annual foreign air transport earnings.* The § 1302 allowable is based upon "aggregate annual foreign air transport earnings", defined in § 1302 (b) largely in terms of Civil Aeronautics Board income statement accounts. For this purpose, there is excluded from territorial and international operating profits reported to the Civil Aeronautics Board all related air transport interest and amortization charges, substantially all net operating revenues not directly attributable to air transport (such as profits or losses from hotels, income from foreign-flag air transport operations and other corporate investments) and relevant foreign taxes.

(ii) *Relation of § 1302 to § 504.* Investments not related to a carrier's foreign air transportation operations are treated separately for all years (including the base period years). Accordingly, a carrier may make positive direct investment, as provided in § 504, in the same manner and subject to the same limitations as other DIs, except that the historical and earnings allowables under § 504 are adjusted by § 1302(d) to exclude consideration of the carrier's foreign air transport operations.

While § 1302 allowables may not be used to authorize positive direct investment in activities other than foreign air transport operations, § 504 allowables may, if the direct investor so chooses, be added to the § 1302 allowables for use in such operations (see § 1302(c)(1)).

(iii) *Carryforwards.* Unused foreign air transport allowables may be carried forward to subsequent years (see § 1302 (c)(2)). However, if the DI elects either § 503 or § 507 in a later year, the § 1302 carryforward will be lost.

The following examples illustrate the effect of § 1302:

Example 1. During 1968, a U.S.-flag air carrier (DI) has foreign air transport earnings of $25 million and unrelated investment earnings in Schedule A of $5 million. DI has Schedule A historical allowables under § 504 (a) of $3 million as a result of equity investment in and loans to hotels, and ground transportation operations associated therewith, in the base period years of 1965 and 1966. Under § 1302, DI would have a worldwide air transport earnings allowable of $7,500,000 (30 percent of $25 million). During 1969, the carrier may make worldwide positive direct investment related to air transport activities of $7,500,000 and, assuming that the historical allowable under § 504 (a) is elected, unrelated positive direct investment in Schedule A of $3 million. Any unused nonair transport allowable may be used by DI worldwide for air transport activities, as well as on a schedular basis for operations not related to foreign air transport. Any unused air transport allowable may only be used in succeeding years for foreign air transportation operations. Any unused carryforward of allowables under § 504(f) may be used worldwide if devoted to foreign air transportation, or in the appropriate scheduled areas if used for other operations.

Example 2. A U.S.-flag air carrier has allowables under § 504, unrelated to air transport activities, of zero. For 1969, the carrier elects § 503 and during 1969 transfers $1 million to Schedule C as a contribution to the capital of a wholly owned hotel corporation in that scheduled area. No other relevant transactions occur. Such investment is authorized by § 503. No further positive direct investment is authorized during 1969 either in air transport or nonair transport activities.

(iv) *Repayment charges under § 1003.* Section 1302 allowables are, like the allowables of Subpart E, reduced by repayment charges incurred under § 1003 (see § 1003(c)(1) and, in particular, § 1003 (c)(4)).

§ B1302–2 Reporting.

Each DI that is a U.S.-flag air carrier engaged in foreign air transport operations and elects § 504 is required to file separate Forms FDI–102/102F for air transport investment and earnings and for other investment and earnings (see § 1302(e)).

If a U.S.-flag air carrier DI commences foreign air transport activity after June 30, 1969, a revised Form FDI–101 should be filed within 30 days after such status is established indicating air transport and nonair transport direct investment experience.

§ 1303–1 Coordination of §§ 504, 506 and 1302.

Section 1302(d) provides that foreign air transport earnings are to be excluded from "annual earnings" computed under § 504(b)(4). However, since "aggregate annual earnings" under § 506 are derived from the § 504(b)(4) computation, § 1303(a) provides that foreign air transport earnings excluded from § 504(b)(4) should be taken into account for purposes of computing aggregate annual earnings under § 506.

Section 1303(b) provides that all reference to § 504 in § 506 (a)(4) and (c) shall be deemed to include reference to § 1302(a).

The following example illustrates the operation of §§ 1302 and 1303:

Example 3. During each of the years 1969 and 1970, DI, a U.S.-flag air carrier, has $1 million in earnings from hotel operations in Schedule B and $3 million of foreign air

transport earnings. DI has no § 504(a) historical allowable, and hotel and foreign air transport earnings during 1966–67 were zero.

In 1970 DI elects § 504(b). DI's § 504(b) annual earnings for 1969 were $1 million (since foreign air transport earnings were excluded under § 1302(d)). DI's § 504(b) allowable for 1970 is $300,000 ($1,000,000×30%). DI's § 1302 foreign air transport allowable is $900,000 ($3,000,000×30%). In 1970 DI also has a § 506 allowable of $400,000, computed as follows (000 omitted):

§ 506(a)(4) aggregate annual earnings for 1970	$4,000
Under § 1303(a), § 504(b)(4) earnings of $1,000 are added to § 1302 (b) foreign air transport earnings of $3,000.	
Less base period aggregate annual earnings	0
Incremental earnings	$4,000
40 percent of incremental earnings	$1,600
Less the largest of the allowables available under § 503 ($1,000); § 504(a) and § 1302 ($900); and § 504(b) and § 1302 ($1,200), as required by § 1303(b)	$1,200
§ 506 allowable	$400

During 1970 DI makes positive direct investment of $400,000 in connection with hotel operations, and positive direct investment of $1,100,000 in connection with foreign air transport operations. Such positive direct investment is authorized by §§ 504(b), 1302, and 506. DI then has a carryforward under § 506 of $100,000 because, under § 506(c), positive direct investment to the extent authorized by § 504 (and § 1302, as provided by § 1302(b)) is deemed made pursuant to those sections and not under § 506. Only the excess of $300,000 is charged against DI's § 506 allowable.

B1400—Subpart N (§§ 1401–1405)

§ B1400–1 Introduction.

Subpart N of the regulations, which deals with "overseas finance subsidiaries" (OFSs), was published in the Federal Register in final form on May 7, 1970 (35 F.R. 7228), effective as of January 1, 1970.

In general, Subpart N accords special status to funds acquired in certain borrowings from sources outside the United States and Canada by an AFN which has been qualified as an OFS. When such funds are lent by the OFS to the DI, they become available proceeds of long-term foreign borrowing and may offset positive direct investment. Such funds may also be transferred between the OFS and other AFNs of the DI without involving a net transfer of capital. Repayment by the DI or the OFS of an OFS's qualified foreign borrowing has much the same effect as repayment of long-term foreign borrowing by a DI. All other subparts of the regulations apply to all OFS transactions except to the extent specifically modified by Subpart N.

The Office has previously issued specific authorizations, under § 801, which, in effect, treat certain borrowing made through an OFS as if the borrowing were a long-term foreign borrowing by the DI. Adoption of Subpart N has made it unnecessary for a DI to obtain such a specific authorization. Any such specific authorizations issued in 1968, 1969, or 1970 are superseded by Subpart N beginning January 1, 1970, and, consequently, transactions involving OFSs occurring during 1970 and thereafter are governed by Subpart N.

§ B1401–1 Definitions.

The definition of an OFS is contained in § 1401(a). Section 1401(a) (1) and (2) require that an OFS be a wholly owned, non-Canadian AFN of the DI.

Section 1401(a)(3) provides that an AFN may qualify as an OFS only if the AFN's principal business is to borrow funds from foreign nationals, other than AFNs or Canadian persons, on terms which would qualify such borrowing as long-term foreign borrowing if made by a DI (see §1401(b)) and to lend such borrowed funds to the DI or to use such funds in loans to or acquisition of equity interests in other AFNs. The principal business requirement is satisfied if the OFS is at all times a financing company (i.e., does not engage in manufacturing, sale of goods or services, or other similar operations); does not deal or trade in securities; and substantially all of its borrowed funds are held, at all times, in the form of debt obligations of the DI, debt obligations of AFNs or equity interests in AFNs. However, pending commitment of borrowed funds, or in the interval between changes in the commitment of such funds, an OFS may temporarily hold such funds in the form of government securities; or in the form of debt obligations (including, without limitation, negotiable and nonnegotiable instruments, commercial paper, demand and time deposits and certificates of deposit) having a maturity of less than 12 months.

Section 1401(a)(4) provides that a DI may claim the benefits of the special rules contained in Subpart N only if its OFS is formally qualified in accordance with the procedures set forth in § 1402.

Note that contributions of funds or other property by the DI or AFNs to the equity capital of the OFS constitute transfers of capital to the OFS, and such transfers are not affected by Subpart N.

Section 1401(b) defines "overseas borrowing" as borrowing by an OFS which would be long-term foreign borrowing, under § 324, if made by a DI.

Section 1401(c) defines "overseas proceeds" as the funds or other property received by the OFS in overseas borrowing. Overseas proceeds invested by the OFS or the DI in debt obligations of or equity interests in other AFNs of the DI remain overseas proceeds until repayment of the overseas borrowing or proceeds borrowing. See § 1404.

Section 1401(d) defines "available overseas proceeds" as overseas proceeds held by the OFS. Notwithstanding § 505, overseas proceeds may be transferred by the OFS to AFNs of the DI without being included in the computation of net transfer of capital under § 313. See § 1403 (a)(2).

In addition, overseas proceeds transferred to the DI in proceeds borrowing, as defined in § 1401(e), are thereafter treated as available proceeds of long-term foreign borrowing. See § 1403(a) (1). The proceeds borrowing must be continuously outstanding for at least 12 months after the original date of the loan, and any debt instrument evidencing such loan may not be sold or otherwise transferred by the OFS prior to repayment or cancellation. If the OFS ceases to hold any such debt instrument, the loan of overseas proceeds to the DI will fail to qualify as proceeds borrowing, and the Office may revoke the OFS's qualification, as provided in § 1402(c).

§ B1402–1 Qualification.

As provided in § 1402(a), OFS qualification is conditioned upon the filing of a certificate in letter form, addressed to the Director, Office of Foreign Direct Investments, Department of Commerce, Washington, D.C. 20230, identifying the AFN to be qualified as an OFS, setting forth sufficient information to demonstrate that the AFN has been organized, is owned and is operating, and that the DI intends that the AFN will continue to operate, in accordance with provisions of § 1401(a) (1), (2), and (3). If the person signing the certificate is not an officer of the DI, evidence of authority to file such certificate must be attached.

Any certificate filed with the Office is effective for the compliance year in which it is filed and thereafter, unless withdrawn by the DI with the permission of the Office or revoked by the Office, as provided in § 1402(c). The Office will not revoke any certificate unless it determines that the AFN was not organized, is not owned, or is not operating in accordance with the provisions of § 1401(a) (1), (2), and (3), or that the DI failed to comply with the recordkeeping requirements of § 1402(b).

As provided in § 1402(d), all specific authorizations previously issued by the Office deeming certain financing AFNs to be persons within the United States or unaffiliated foreign lenders are of no further effect beginning January 1, 1970. Each such AFN is deemed to have qualified as an OFS under § 1402(a), and transactions involving such OFS are governed by Subpart N during 1970 and thereafter and not by the terms of such specific authorization.

§ B1403–1 Transfers of overseas proceeds; foreign balances.

Pursuant to § 1403(a)(1), the loan of overseas proceeds to the DI in proceeds borrowing is not a transfer of capital under § 312(b), but does result in such overseas proceeds being treated as available proceeds of long-term foreign borrowing, as defined in § 324(d). If in connection with an overseas borrowing the OFS issues debentures convertible into stock of the DI with detachable warrants entitling the holder to purchase stock of the DI, the DI will be deemed to have made a transfer of capital to the OFS in the amount of the value of the warrants; however, the amount of proceeds of overseas borrowing will not be reduced because of the warrants.

Pursuant to § 1403(a)(2), transfers of overseas proceeds by the OFS to AFNs of the DI in exchange for debt obligations of or equity interests in such AFNs

do not involve net transfer of capital, notwithstanding §§ 505 and 313. Pursuant to § 1403(a)(3), overseas proceeds can also be returned by AFNs to the OFS without involving net transfer of capital, notwithstanding §§ 505 and 313, and such overseas proceeds in the hands of the OFS again become available overseas proceeds. The exemption from §§ 505 and 313 provided for in § 1403 (a)(3) does not apply to the return of invested overseas proceeds by an AFN to the OFS to the extent there has been repayment of the overseas borrowing or the proceeds borrowing (see § 1404 (a)). Note that overseas proceeds transferred by an OFS to an AFN in exchange for equity interests in such AFN are not affected by changes in the value of the securities.

Example 1. DI desires to make a transfer of capital to Schedule C in 1970 in the amount of $10 million. DI causes a wholly owned incorporated Schedule C AFN to organize a Schedule A OFS in the Netherlands Antilles (for which a certificate under § 1402 (a) is properly filed in due course) and to contribute $2 million to such OFS as original equity capital. OFS receives $10 million from an overseas borrowing which has been fully guaranteed by the DI as to repayment of principal and payment of interest. OFS lends $10 million to DI in return for a promissory note continuously outstanding for at least 12 months, which is held by the OFS. DI expends $10 million in a transfer of capital to an AFN in Schedule C. The capitalization of the OFS results in a § 312(b) transfer of capital of $2 million from Schedule C and a § 312(a) transfer of capital of $2 million to Schedule A, pursuant to § 505. The loan of $10 million by the OFS to its DI is a proceeds borrowing and does not constitute a § 312(b) transfer of capital. However, the $10 million of overseas proceeds in the hands of the DI are treated as available proceeds of long-term foreign borrowing. The transfer of the $10 million to an AFN in Schedule C is a § 312(a) transfer of capital offset by expenditure of available proceeds under § 313(d)(1).

Example 2. In 1970 an OFS in Schedule C receives $10 million of overseas proceeds and invests $9 million thereof in debt obligations of an AFN in Schedule B. In 1971 the DI directly repays $3 million of overseas borrowing, resulting in a transfer of capital to Schedule B of $3 million, under § 1404(a)(3). Later in the same year, the AFN repays to the OFS $3 million of the $9 million borrowed. Under § 1403(a)(3), the DI may treat the repayment by the AFN to the OFS either as being a return of $3 million of overseas proceeds (and hence not subject to §§ 505 and 313) or as a return of funds which have lost their status as overseas proceeds by virtue of the $3 million repayment of overseas borrowing (and hence subject to §§ 505 and 313).

Example 3. Schedule A OFS invests $6 million of overseas proceeds in equity securities in a Schedule B AFN. Prior to repayment of the overseas borrowing, the equity interest is sold by the OFS to an unaffiliated foreign national for $7 million, which constitutes a transfer of capital of $7 million to DI from Schedule B under § 312(b) and a transfer of capital of $7 million from DI to Schedule A under § 312(a). See § B505-6(ii). Under § 1403(a)(3), this transaction is not recognized for purposes of §§ 505 and 313 to the extent of the overseas proceeds of $6 million. Therefore, DI will have a positive transfer of capital of $1 million to Schedule A and a negative transfer of capital of $1 million to Schedule B.

Pursuant to § 1403(b)(1), foreign balances of an OFS (other than available overseas proceeds and funds contributed as equity capital) held in liquid form are deemed to be liquid foreign balances of the DI and are subject to limitation under § 203(c).

Example 4. DI borrows $5 million in long-term foreign borrowing under § 324. The $5 million are contributed by DI to an AFN as original equity capital. The AFN places such funds in a demand deposit account in a foreign bank. The AFN is thereafter qualified as an OFS. The $5 million are not considered liquid foreign balances of the DI under § 203(c). See § 1403(b).

Pursuant to § 1403(b)(2), a DI who elects § 504 and whose OFS holds available overseas proceeds at the end of any year is subject to the prohibitions of § 203(d)(1).

Example 5. A DI electing § 504 organizes an AFN in the Netherlands Antilles and in the same year qualifies it as an OFS. During 1970, the OFS transfers $1 million of overseas proceeds to the DI in proceeds borrowing and retains available overseas proceeds of $3 million. If the OFS holds the $3 million of available overseas proceeds in foreign property on December 31, 1970, the DI would be prohibited from making positive net transfers of capital which result in positive direct investment during 1970.

§ B1404-1 Repayment of overseas borrowing and proceeds borrowing.

Repayment by the DI or the OFS of overseas borrowing and repayment by the DI of proceeds borrowing result in transfers of capital (and corresponding reduction of overseas proceeds) and/or reduction of available proceeds of long-term foreign borrowing (and corresponding reduction of overseas proceeds). Repayment by the DI of overseas borrowing means both direct repayment by the DI or indirect repayment by the DI whereby the DI provides funds to the OFS to enable it to repay. When the DI repays proceeds borrowing for the purpose of enabling the OFS to repay the overseas borrowing, the repayment by the DI is deemed for purposes of § 1404(a) to be of overseas borrowing and not of proceeds borrowing. In other words, for purposes of § 1404(a), repayment of proceeds borrowing occurs only when the OFS does not use the funds or other property repaid to it by the DI to repay overseas borrowing.

Repayment by the DI of overseas borrowing or proceeds borrowing results in the following charges:

(1) Pursuant to § 1404(a)(1), there is a reduction of available proceeds of long-term foreign borrowing resulting from proceeds borrowing. There is also an equal reduction in the amount of overseas proceeds.

(2) Pursuant to § 1404(a)(2), if the amount of repayment exceeds the reduction of available proceeds under § 1404 (a)(1), transfers of capital are charged proportionately to the scheduled areas where the DI has expended or allocated available proceeds of long-term foreign borrowing resulting from proceeds borrowing. There is also an equal reduction in the amount of overseas proceeds.

(3) Pursuant to § 1404(a)(3), if the amount of repayment exceeds the aggregate reductions of available proceeds and transfers of capital to AFNs under § 1404(a) (1) and (2), transfers of capital will be charged proportionately to the scheduled areas where the OFS has transferred overseas proceeds pursuant to § 1403(a)(2). There is also an equal reduction in the amount of overseas proceeds held by such AFNs.

(4) Pursuant to § 1404(a)(4), any repayment in excess of reductions of available proceeds and transfers of capital pursuant to § 1404(a) (1), (2), and (3) is a transfer of capital to the scheduled area in which the OFS is incorporated. There is also an equal reduction in the amount of overseas proceeds held by the OFS.

In the event of repayment of overseas borrowing by reason of debt holders' exercise of conversion or similar rights, transfers of capital, but not reduction of available proceeds, are deferred until the year following such conversion. See § 1404(a)(5).

The total amount of overseas proceeds received by an OFS may, due to discounts, commissions or fees, be less than the amount of the OFS's indebtedness to its lenders. Under these circumstances, the aggregate amount of transfers of capital and reductions of proceeds pursuant to § 1404 cannot exceed the amount of overseas proceeds. See § 1404 (a)(6). The amount repaid attributable to discounts, commissions or fees is deemed to be the last amount repaid. Note that repayment of proceeds borrowing after repayment of the underlying overseas borrowing is a transfer of capital to the scheduled area in which the OFS is incorporated. However, repayment by the OFS of overseas borrowing after repayment of proceeds borrowing does not result in a transfer of capital.

Example 6. In 1970, a Schedule A OFS issues $10 million of debentures which are sold at a discount, and the OFS receives $9,500,000 as available overseas proceeds. The OFS transfers $1 million to Schedule C AFNs and $2 million to Schedule B AFNs. Then $6 million is transferred in proceeds borrowing to the DI, which expends $4 million in a transfer of capital to Schedule C and allocates $1,500,000 to positive direct investment in Schedule A. In 1972, $7 million of the debentures are redeemed and, in 1973, $3 million of the debentures are redeemed. In 1972 the transfers of capital and reductions would be: Under § 1404(a)(1), a $500,000 reduction in available proceeds; under § 1404(a)(2), transfers of capital of $4 million to Schedule C and $1,500,000 to Schedule A; and under § 1404(a)(3), transfers of capital of $333,000 to Schedule C and $667,000 to Schedule B. In 1973, the transfers of capital would be: Under § 1404(a)(3), transfers of capital of $667,000 to Schedule C and $1,333,000 to Schedule B; and then, under § 1404(a)(4), a transfer of capital of $500,000 to Schedule A. Although repayment of overseas borrowing equalled $10 million, the aggregate transfers of capital and reduction under § 1404(a)(6) equal only $9,500,000, the original amount of overseas proceeds before any repayments.

Example 7. Schedule A OFS receives $9,500,000 from the issue of $10 million of debentures. The OFS keeps $500,000 as available overseas proceeds and $9 million are loaned to the DI in proceeds borrowing. DI does not expend or allocate the resulting

available proceeds. DI repays the $10 million overseas borrowing. There is a reduction in available proceeds of $9 million, under § 1404(a)(1), and a transfer of capital to Schedule A of $500,000, under § 1404(a)(4).

Examples 8. Schedule A OFS receives $10 million of overseas proceeds and transfers $6 million of overseas proceeds to an AFN in Schedule C and $4 million to an AFN in Schedule B. In 1971, the DI repays $1 million of overseas borrowing. Under § 1404(a)(2), there are transfers of capital to Schedule C of $600,000 and to Schedule B of $400,000. In 1972, the OFS disposes of its interest in the Schedule B AFN and receives $5 million in cash. Only $3,600,000 of such funds constitute overseas proceeds. The OFS lends $3,600,000 to the DI in proceeds borrowing and the DI allocates the resulting available proceeds to positive direct investment in Schedule C. In 1973, the DI repays the balance of the overseas borrowing. There is a transfer of capital to Schedule C of $3,600,000, under § 1401(a)(2), and a transfer of capital to Schedule C of $5,400,000, under § 1404(a)(3).

Pursuant to § 1404(b), repayment by the OFS of overseas borrowing first reduces available overseas proceeds. If the amount of repayment exceeds such reduction, the excess is treated as repayment by the DI of overseas borrowing under § 1404(a).

Example 9. In 1970, OFS receives $10 million of available overseas proceeds from an overseas borrowing, and lends $9 million to the DI in proceeds borrowing. The OFS invests $500,000 in debt obligations of AFNs. The DI expends $8 million of the resultant available proceeds in a transfer of capital to Schedule C. In 1971, the OFS repays $2 million. Available overseas proceeds are reduced from $500,000 to zero, under § 1404(b)(1). Available proceeds are reduced from $1 million to zero, under §§ 1404(b)(2) and 1404(a)(1). There is a transfer of capital, under § 1404(a)(2), to Schedule C in the amount of $500,000.

Example 10. In 1970, an OFS receives $10 million in overseas borrowing and lends the $10 million to the DI in proceeds borrowing, and the resulting available proceeds are allocated to positive direct investment in Schedule C. DI repays proceeds borrowing, in 1971, in the amount of $10 million. Under § 1404(a)(2), there is a transfer of capital to Schedule C of $10 million, and overseas proceeds are extinguished. In 1973, the OFS repays the overseas borrowing. Since there are no remaining overseas proceeds, no transfer of capital or further reduction results. See § 1404(a)(6).

§ B1405–1 **Authorized repayments.**

Under § 1405, transfers of capital resulting in positive direct investment, which arise from repayment by a DI of an overseas borrowing or a proceeds borrowing to enable the OFS to repay its overseas borrowing, will be generally authorized under Subpart J in a manner similar to repayment by a DI of other AFN borrowing. As in the case of DI guarantees of AFN borrowing, the general authorization of § 1002 is conditional upon the filing by the DI of a certificate (Form FDI–106) pursuant to § 1002(b). Note that, by virtue of § 1405(a), DI's guarantee of an OFS borrowing that does not qualify as an overseas borrowing is not covered either by § 1405(b) or § 1002(a).

[F.R. Doc. 70-12557; Filed, Oct. 6, 1970; 8:45 a.m.]

U.S. DEPARTMENT OF COMMERCE
OFFICE OF FOREIGN DIRECT INVESTMENTS
WASHINGTON, D.C. 20230

September 11, 1970

MEMORANDUM FOR: DIRECT INVESTORS

Donald P. Katz, Acting Director,

FROM: for Richard P. Urfer
Director

To assist direct investors wishing to apply for specific authorizations, specific exemptions and interpretive opinions with respect to the Foreign Direct Investment Regulations, there are attached revised instructions for submitting such applications to this Office during 1970. The attached revisions supersede the instructions issued May 26, 1970.

Please note that the Office normally will not process applications for specific authorizations or exemptions submitted after expiration of the compliance period related to the relief requested.

As announced in the May 26, 1970 instructions, a filing deadline of November 1, 1970 has been established for those applications requesting relief affecting positive direct investment in 1970. Applications received after this deadline will receive a lower processing priority than applications filed on time. In this connection, note that merely filing a request for a specific authorization, specific exemption or interpretive opinion does not relieve a direct investor of his responsibility to be in compliance with the Regulations.

Changes from the May 26, 1970, memo, all of which are in Part I, are as follows: C. Merchandise export credit relief has been substantially revised; D. Reinvested earnings relief and E. Foreign equity financing -- new material has been added; G. Triangular & parallel financing, Item 3.a.(1)(b) has been changed; I. Upstreaming the §504(b) allowable and J. Capitalized exploration expenses are new sections.

I request your cooperation in following the revised instructions and in meeting the filing deadline.

Attachment

U.S. DEPARTMENT OF COMMERCE
OFFICE OF FOREIGN DIRECT INVESTMENTS
WASHINGTON, D.C. 20230

September 11, 1970

(Amends and Supersedes Document of May 26, 1970)

REVISED INSTRUCTIONS FOR SUBMITTING APPLICATIONS FOR SPECIFIC AUTHORIZATIONS, SPECIFIC EXEMPTIONS OR INTERPRETATIONS

A direct investor ("DI") seeking a specific authorization, a specific exemption, or an interpretation with respect to the Foreign Direct Investment Regulations should submit a written application in accordance with these instructions. A person not yet a DI wishing to file an application should also follow the instructions. DIs with questions should telephone the Chief Counsel (Area Code 202-343-7384), the Director, Authorizations & Reports Division (Area Code 202-343-7333), or the Assistant Director for Audits and Accounting, Compliance Division (Area Code 202-343-7306) for guidance with regard to interpretative legal opinions, specific authorizations, or interpretative accounting opinions, respectively.

Introduction

A DI may apply for: (1) a specific authorization to effect transactions that would otherwise be prohibited; (2) a specific exemption from complying with a requirement of the Regulations; and (3) an interpretative opinion relating to questions arising from a particular factual situation.

These instructions, which amend and supersede those issued by the Office on May 26, 1970, contain the following guidelines:

Part I - Application for a specific authorization or exemption.

A. General requirements

B. The borrowing test

C. Merchandise export credit relief

D. Reinvested earnings relief

E. Foreign equity financing

F. Repatriation of available proceeds

G. Triangular and parallel financing

H. Liquid foreign balances

I. Upstreaming of the §504(b) Earnings Allowable

J. Capitalized Exploration Relief

Part II - Application for an interpretative opinion.

Part III - Application for a specific authorization or exemption and/or an interpretative opinion.

Applications and replies by this Office will be considered confidential communications.

I. APPLICATION FOR A SPECIFIC AUTHORIZATION OR EXEMPTION

A. General Requirements

An application for a specific authorization or exemption must be submitted in quadruplicate to the Director, Office of Foreign Direct Investments, U. S. Department of Commerce, Washington, D. C. 20230. The application must be accompanied by proof of authority as provided by §1000.803 of the Foreign Direct Investment Regulations (all sections hereafter cited will refer to the Regulations and will omit the prefix "1000"). Printed or written information previously supplied by a DI may be incorporated by reference in an application.

There is no prescribed form for an application. However, each application should contain, in addition to the information appropriate to the particular request described in Sections C through J, below, the following information:

1. Name and address of the DI.
2. A brief description of the DI's business, the DI's most recent consolidated balance sheet and profit and loss statement and, where available, a copy of the DI's most recent annual report.
3. A clear and precise statement of the request, with reference, to the extent possible, to amounts involved.
4. Business, economic, and other considerations in support of the application.
5. The name, address, and telephone number of at least two persons to whom requests for additional information or clarification may be addressed.

6. Any necessity for action on an application by a particular date.

7. Identification of other applications for specific authorizations, specific exemptions, or interpretative opinions filed since January 1, 1968 by or on behalf of the DI, or by persons who together with the DI constitute part of an affiliated group, a family group, or an associated group, as defined in the Regulations. (See 1970 General Bulletin §B900.)

8. In the case of an application by a member of an associated group, identification of each group affiliated foreign national (group "AFN").

9. Estimates by scheduled area of the following for 1970:

   a. DI's share of reinvested earnings of incorporated AFNs

   b. Net transfers of capital

   c. The use of proceeds of long-term foreign borrowing

   d. Program direct investment

   e. Allowables

      (1) The §504(a) historical allowable, §504(b) earnings allowable, and any carryforward from 1969 if §504 was elected in 1969.

      (2) The estimated §506 incremental earnings allowable, if applicable, and the basis for the estimate.

      (3) Tentative selection of allowable for 1970.

      (4) Any reduction of allowable as a result of compliance action, condition of a prior specific authorization, or §1003 repayment charges from prior or current years.

   f. Available proceeds as of December 31, 1969 and any net new long-term foreign borrowing anticipated during 1970.

   g. The schedular allocations or expenditures of long-term foreign borrowing proceeds through December 31, 1969.

B. The Borrowing Test

Under §§313(d)(1) and 306(e), the amount of positive direct investment charged to a DI in any year may be reduced by the amount of proceeds of long-term foreign borrowing (as defined in §324) expended in making transfers of capital or allocated to positive direct investment during that year. Therefore, applications for specific authorizations or exemption involving positive direct investment in excess of the amounts generally authorized under the Regulations, except applications of the types described in Sections C through J below, must set forth in detail the efforts of the applicant to obtain a long-term foreign borrowing. The detailed information must be documented to demonstrate conclusively one of the following points:

1. Foreign debt financing has been attempted and cannot be arranged;

2. Foreign debt financing can be arranged only at a prohibitive cost; or

3. Foreign debt financing can be arranged but only on terms that will not permit the filing of a certificate under Subpart J of the Regulations. (In this last case, the name of the lender and the terms offered should be transmitted to permit the Office to consider appropriate relief.)

C. Merchandise Export Credit Relief

The Office normally will grant relief for increases in specified merchandise export credit to AFNs to the extent that the ratio between such specified merchandise export credit outstanding at year-end and specified merchandise exports for the current year is in line with historical experience. If the ratio varies from that of prior years, a detailed justification of the variance should be submitted.

In addition to the information generally required under Section A above, the DI should submit an exhibit setting forth, by scheduled area, projections for 1970 and actual data for 1966 through 1969 for specified merchandise exports and specified merchandise export credit outstanding as of December 31 for each such year. (For purposes of this application, export data for Spanish AFNs should be included in Schedule B.)

The term "specified merchandise exports" means the aggregate dollar value charged on the DI's books of account for all merchandise exported by the DIs or on its behalf (whether produced by the DI or other suppliers) from the United States during a specified period to all of its AFNs in

one or more scheduled areas (other than Canadian affiliates of the DI, as defined in §1000.1101(a)). This valuation should be consistently applied, and the DI should restate the value of its exports to reflect f.a.s. value if the values charged on the DI's books of account differ by more than 10% from f.a.s. value. F.a.s. value includes U.S. inland freight insurance, and other charges to the place of export and excludes freight and other charges beyond that point.

The term "specified merchandise export credit" means the aggregate dollar amount of credit that is (i) carried on the books of account of the DI as having been extended by the DI to all of its AFNs (other than Canadian affiliates) in one or more specified scheduled areas in connection with specified merchandise exports to such AFNs and (ii) outstanding on a specified date (including without limitation, advances to, notes from and open accounts with such AFNs). Specified merchandise export credit outstanding should not include any amounts resulting from other types of intercompany transactions. If the DI cannot segregate the specified merchandise export credit outstanding from a general intercompany account, a detailed explanation of the calculations of specified merchandise export credit should be included.

A lease of property by the DI to an AFN is considered a transfer of capital if the property has a remaining useful life at the time of the lease of one year or more and is not required or expected to be returned to the DI in less than one year. The credit by the DI to an AFN arising from such leases does not qualify for relief. It is therefore essential that specified merchandise export and export credit figures presented as a part of the application do not include merchandise leased to AFNs by the DI on terms longer than one year. If the credit terms granted by the DI are longer than one year, the transactions do not qualify for relief.

Export financing by a DI which takes the form of a capital contribution to its AFN (e.g., payment for exports by issuing additional shares of its common stock) does not qualify for relief.

The applicant's need for relief generally is determined on the basis of its aggregate worldwide exports and credits. Relief is usually issued in terms of a specific authorization to make positive direct investment in a particular compliance year in the form of increases in specified merchandise export credit, generally on a worldwide basis.

In determining the amount of relief to be granted, the Office examines the relationship between specified merchandise exports and specified merchandise export credit outstanding at year-end. If the requested amount of relief reflects historical experience, relief is, in general,

readily available to all DIs in an amount equal to the least of the following:

1. An amount calculated by multiplying the ratio of specified merchandise export credit to specified merchandise exports for the past four years (1966-1969) times 1970 specified merchandise exports and then subtracting the specified merchandise export credits outstanding on December 31, 1969.

2. The increase in specified merchandise export credit outstanding on December 31, 1970 over that on December 31, 1969.

3. The increase in specified merchandise exports in 1970 over 1969.

If the requested relief is not consistent with historical experience, more detailed information is required. The extent to which the Office authorizes relief will be based on the merits of the particular justification. Typical of the factors the Office will consider if a DI requests export credit relief in excess of the limitations above are the following:

1. Changing seasonal pattern of exports, particularly with respect to increases in export shipments occurring close to the end of the compliance year;

2. Unusually low level of open accounts in the historical period when contrasted to current levels as a result of local borrowing by AFNs during that period;

3. Change in product mix involving a greater proportion of current exports of goods typically sold on longer payment terms;

4. Increase in current level of exports to particular AFNs whose credit terms are customarily longer;

5. Shift from exporting to non-AFNs to exporting to AFNs or in the instance when a DI is beginning export operations.

If the level of specified merchandise exports decreases in the future, the specific authorization that will be issued will include a recapture provision, which will charge future allowables in an amount up to the amount of relief utilized.

Some export credit relief specific authorizations granted in prior years contained provisions to recapture negative transfers of capital arising from AFN repayments of export open accounts in the event that specified

merchandise export credit outstanding at the end of some future year were to fall below that of the year relief was granted. Such provisions in prior year specific authorizations will be rescinded as part of granting of export credit relief in 1970 and the revised recapture provisions substituted.

Another feature of specific authorizations which grant export credit relief on a worldwide basis is the "upstream transfer" provision. This provision authorizes the DI to "upstream" a negative transfer of capital which results from a decrease in specified merchandise export credit in downstream areas. (For example, Company X has a $2 million export credit increase in Schedule C and a $1 million decrease in Schedule A. If the Office grants $1 million in total worldwide export credit relief, the specific authorization letter will also authorize the "upstreaming" of the Schedule A $1 million negative capital transfer of capital to Schedule C for an authorized total relief of $2 million in Schedule C.)

D. <u>Reinvested Earnings Relief</u>

Despite the flexibility afforded to DIs to offset earnings reinvested in excess of allowables by negative net transfers of capital or allocation of available proceeds, hardship may result when DIs are prevented from receiving dividends from AFNs. Foreign laws, contractual restrictions, or lack of effective control by DIs over the dividend policies of AFNs may cause such hardship. Dividends received from certain AFNs may also result in hardship owing to a significantly increased U.S. tax burden on the DI. In such cases, DIs may apply for relief to reinvest "restricted" earnings in excess of allowables.

Reinvested earnings relief consists of the three general categories discussed below. Any such relief granted will normally be limited to the amount by which the "restricted" earnings exceed the DI's <u>total</u> Subpart E allowables. Specific authorization will generally be granted to upstream schedular allowables in "lower" scheduled areas (except the supplemental $4 million allowable for Schedule A under §507(a)(2)) to cover restricted earnings in the "higher" scheduled areas in excess of allowables in those schedules.

Pertinent information previously furnished in 1968 or 1969 requests may provide the basis for relief in 1970, but the application should substantiate the continued applicability of such information to the 1970 situation of the AFN.

1. The Office is prepared to issue specific authorizations to reinvest earnings in excess of allowables to DIs able to document the need to reinvest earnings in certain incorporated AFNs because of demonstrated legal requirements or lack of effective control over the dividend policies of those AFNs.

An application to reinvest restricted earnings based on these grounds must include for <u>each</u> AFN for which relief is requested:

a. A forecast of 1970 earnings, dividends, and reinvested earnings.

b. Reasons for the DI's inability to cause the payment of dividends by these AFNs. supported by:

   (1) An opinion of a qualified attorney or accountant confirming restrictions due to foreign laws or contracts, or

   (2) Certification that the DI lacks effective control over the dividend policy of each AFN for which relief is requested. For this latter case, the DI should provide information as to ownership of the AFN (including the percentage of DI ownership), specify the number of directors representing the DI and other owners on the board of directors of the AFN, and explain why the DI lacks effective control over the dividend policies of the AFN.

Furthermore, the DI should show why other AFNs in the same schedule or upstream schedules cannot declare dividends sufficient to offset the restricted earnings.

As a condition for issuing this relief, the DI's future allowables will be charged.

2. If the earnings of a particular AFN are exempt from foreign taxes or subject to foreign taxes significantly lower than those in the United States, so that dividend payments from that AFN would result in a substantial additional U.S. tax burden on the DI, the Office will issue a specific authorization under which a DI would be permitted to reinvest the earnings of the particular AFN, provided that the AFN purchases a certificate of deposit with maturity of over one year from a U.S. bank in the amount of the relief utilized.

   Applications for this relief should include a precise evaluation of the tax problem that would be caused by dividend payments on the part of the particular AFN, as well as demonstration of the need for allowables to cover 1970 restricted earnings of any AFNs.

3. The concurrence of the 60-day dividend election of OFDI with the rule established by §902(c) of the Internal Revenue Code (attributing dividends to particular tax years) may in certain instances create a tax hardship for the DI. If a DI, having previously made the 60-day dividend election under §306, can demonstrate that a significant tax saving would result from deferral of dividend payments, the Office will grant additional days for declaration of such dividends.

   Applications should contain detailed information for each AFN whose deferral of dividend payments would result in tax savings, including a computation of all foreign and U.S. taxes connected with the dividend payment (1) if made within the first 60 days of 1971, and (2) if made a few days later. The DI should also show why the particular AFN and not any other AFN must pay the dividends to achieve 1970 compliance in the corresponding scheduled area. For purposes of these applications, only the allowables in the scheduled area in question need be examined.

Requests for reinvested earnings relief of the above types will not require a showing of the DI's inability to allocate proceeds of long-term foreign borrowing to cover such reinvested earnings. All other requests for reinvested earnings relief, however, will be considered only after the borrowing test described in Section B has been met.

E. Foreign Equity Financing

The Office normally will grant the deferment of charges to Subpart E allowables in whole or in part beyond the current year in response to an application involving one of the three types of foreign equity financing transactions described below.

The application should describe in detail the arrangement for and purpose of the proposed equity financing and features of the proposal that will induce the foreign recipients to hold the securities. The application should also include a true copy of each agreement between the parties and the latest draft of the offering circular or prospectus, if any. DIs must also demonstrate the ability to meet applicable reporting requirements.

The three types of foreign equity financing for which relief may be authorized are:

1. The issuance of convertible preferred shares of a domestically incorporated international finance subsidiary (as described in §323).

The DI must provide an opinion of U.S. counsel or a copy of an Internal Revenue Service ruling that the preferred shares would, if purchased by nationals or residents of the United States, be subject to the Interest Equalization Tax. In qualifying cases, the Office will specifically authorize the proceeds resulting from the sale of such shares to be treated in a manner similar to that of the proceeds of a long-term foreign borrowing.

The Office may also specifically authorize positive direct investment arising out of conversion of the convertible preferred stock to be treated in a manner similar to that provided by §1003, provided that, the DI demonstrates that the terms and features of the preferred stock have been designed to encourage retention and to discourage conversion by foreign holders. Irrespective of whether such treatment is granted, charges to allowables will be deferred to the following year.

The Office will also consider applications for relief pertaining to the issuance of any other equity securities attracting the Interest Equalization Tax.

2. Exchange by a DI of its equity securities in a direct investment transaction with a small group of foreign nationals

When considered appropriate, the Office will defer the charge against investment allowables if all members of the group of foreign nationals receiving such securities agree in writing that such securities will not be sold, transferred or otherwise disposed of within a period of at least three years. The "lock-up" agreement need not prohibit transfers by inheritance and by _inter vivos_ gifts among family members. However, in the case of gifts, the recipient of the gift must agree to the same restrictions as the original holder.

When applying for this type of relief, a DI must present details showing his ability to report accurately on a quarterly basis the ownership of the securities issued to the foreign nationals.

The Office will also grant relief where the foreign party holding the DI's equity securities is a foreign corporation, provided that the corporation is 100% owned by a small number of foreign individuals. In such a case, the "lock-up" agreement regarding the DI's securities will be required from both the corporation and the individuals, and the individuals must agree not to dispose of the foreign corporation during the lock-up period.

This category of relief normally is not available when large foreign institutions, such as banks, mutual funds, and major industrial corporations (especially those with significant portfolio investments) are involved.

3. Other equity financing of foreign direct investment

The Office is prepared to grant specific authorization to defer a portion of the charge to Subpart E allowables resulting from a foreign equity financing transaction involving an exchange of the DI's equity securities for stock or assets of a foreign entity in a transaction that does not qualify under categories 1 and 2 above.

In cases qualifying for this relief, 30 percent of the value of the DI's equity securities exchanged will be charged as a transfer of capital in the year in which the transaction is effected. In each of the five succeeding years, 10 percent of the original value of the shares exchanged will be charged as a transfer of capital. (This form of relief completely exempts 20 percent of the transfer of capital involved, in addition to permitting "installment" charges against Subpart E allowables.)

If the DI's equity securities are to be issued in a fixed, predetermined amount at specified future dates, the amount specifically authorized will be based on the total number of shares to be issued in both the current and future years. If "kicker" or bonus stock is to be issued on the basis of subsequent contingent conditions being met, the DI will be required to estimate the quantity of kicker stock likely to be so issued, and the specifically authorized amount will be grossed up accordingly. But if, under the terms of the agreement with the foreigners, it appears probable that kicker stock will amount to less than 10% of the total value of the shares issued in the entire transaction, the charge to allowables attributable to such stock may be absorbed in the year it is delivered and based upon the market price prevailing at that future date. Kicker stock issued in excess of that estimated will be charged in the year of issue in an amount equal to the value of the stock at that time.

The Office reserves the right to deny this category of relief whenever it is apparent that reflow of the DI's securities to the United States will occur at a rate significantly faster than provided for by the annual charges to allowables throughout the duration of the specific authorization.

For categories 2 and 3 above, the amount specifically authorized and the corresponding charges will generally be based on the market value of the equity securities transferred by the DI on the date of the acquisition. If however, the stock of the DI is not publicly traded, or is traded only in an extremely limited market, the Office will value the equity financing transaction by whatever appropriate means is available, including value of the foreign equity or assets being acquired, or an upward adjustment of the book value attributed to the transaction by the DI based on past and projected earnings per share.

F. Repatriation of Available Proceeds

A DI requesting a specific exemption from the provisions of §203(d)(1) must establish that compliance with the requirements of this section would:

1. Contravene express representations made by the DI to, or restrictions imposed on the DI by, persons from whom the relevant long-term foreign borrowings were obtained (as conditions to obtaining such borrowings);

2. Create a probability of material adverse United States or foreign tax consequences to the DI;

3. Be prevented because available proceeds were invested in non-liquid long-term foreign investments prior to June 18, 1969; or

4. Cause demonstrable material economic hardship for the DI. (Generally, interest differentials will not be considered sufficient grounds for relief.)

See the 1970 General Bulletin §B 203-8(vi) for additional detail regarding specific exemption from §203(d)(1).

G. Triangular and Parallel Financing

The Office generally will consider as "triangular" a financing arrangement in which a loan by a DI to an unaffiliated foreign national is the basis for, or is otherwise associated with, a loan by the unaffiliated foreign national to an AFN of the DI. The Office generally will consider as "parallel" a financing arrangement in which a loan by a DI to a U.S. subsidiary of an unaffiliated foreign national is the basis for, or is otherwise associated with, a loan by the unaffiliated foreign national to an AFN of the DI.

Both types of financing arrangements constitute transfers of capital by the DI to an AFN, under §312(a), at the time of and in the principal amount of the loan to the AFN. To the extent that a DI absorbs these transfers of capital within generally authorized direct investment allowables, the DI will not need specific authorization relief. Where a DI desires relief, however, on application it will be made available in the full amount of the transfer of capital, if the DI provides acceptable assurances, as described below, that the arrangement will not contravene the objectives of the Regulations.

Applications for specific authorization relief pertaining to triangular and parallel financing arrangements may be abridged. In particular, a DI need not submit the information required by Sections A. 4 and 9 and B above. The DI's submission should include the following, however:

1. Identification of the unaffiliated foreign national and AFN involved in the financing arrangement and, for a parallel financing arrangement, the unaffiliated foreign national's relevant U.S. subsidiary.

2. Description of each loan involved, including principal amount, schedule of repayments, interest rate, currency loaned, guarantee provisions, offset provisions, etc. Certified copies (or copies of the latest drafts) of the relevant legal documents and any governmental approvals that may have been obtained by the DI or its AFN with respect to the arrangement should be included.

3. Assurances that the financing arrangement will not contravene the objectives of the Regulations.

    a. To satisfy this requirement with respect to a triangular financing arrangement, a DI will be required:

        (1) To obtain from the unaffiliated foreign national, and submit to the Office, a written undertaking from the unaffiliated foreign national, in the form of a covenant in a loan agreement, or a written agreement or certificate in some other form acceptable to the Office, that the unaffiliated foreign national will invest within the United States (as defined in §318) the outstanding proceeds of its loan from the direct investor (i.e., the unpaid principal of the loan that is outstanding from time to time) and any reinvestment thereof, in any one or more of the following categories of investments:

(a) Equity securities issued by a corporation organized under the laws of the United States, other than equity securities that would, if purchased by nationals or residents of the United States, be subject to Interest Equalization Tax.

(b) Debt obligations of any political subdivision, agency, or instrumentality of the United States, other than direct debt obligations of the United States Treasury.

(c) Debt obligations (including, without limitation, negotiable and non-negotiable instruments, commercial paper, demand and time deposits, and certificates of deposit) having a remaining maturity of more than 12 months, issued by a domestic bank (as defined in §317), or a non-bank financial institution or corporation organized under the laws of the United States, other than debt obligations that would, if purchased by nationals or residents of the United States, be subject to Interest Equalization Tax, and other than debt obligations of a branch office of any such non-bank financial institution or corporation which is a branch office located outside the United States; and

(d) Real property located within the United States (as a result of which investment the unaffiliated foreign national acquires legal title to such real property); and

(2) To assure the Office, by submission of a written certificate by the DI or by some other manner acceptable to the Office, that, based upon information communicated to the DI by the unaffiliated foreign national and upon other information in the DI's possession, it is the DI's reasonable understanding and belief that it is not the intention of the unaffiliated foreign national to use the proceeds of its loan from the DI in any manner either:

(a) To replace or substitute for funds that the unaffiliated foreign national otherwise intended to provide or obtain from sources outside the United States, or

(b) To facilitate transfers of funds from the United States that would not have occurred in the absence of such loan.

Note: As a condition to specific authorization relief involving triangular financing arrangements, the DI will be required to report, on or together with its Quarterly Report, Form FDI-102, first due after the loan to the unaffiliated foreign national is made, and thereafter on or together with its Annual Report, Form FDI-102F, for each year so long as such loan has not been repaid, whether the categories of investments required pursuant to the condition set forth in paragraph 3.a.1. above have been properly maintained by the unaffiliated foreign national. If the unaffiliated foreign national does not properly maintain such investments, the DI will be charged with a transfer of capital to its relevant AFN.

b. To satisfy this requirement with respect to a parallel financing arrangement, a DI will be required to assure the Office, by submission of a written certificate by the DI or by some other manner acceptable to the Office that, based upon information communicated to the DI by the unaffiliated foreign national and/or the latter's U.S. subsidiary receiving the loan from the DI, and upon other information in the DI's possession, it is the DI's reasonable understanding and belief that it is the intention of the unaffiliated foreign national to cause its U.S. subsidiary, and it is the intention of the U.S. subsidiary:

(1) To invest and retain within the United States (as defined in §318) the outstanding proceeds of its loan from the DI, and any reinvestment thereof, and not to hold any of such proceeds in any of the following forms:

(a) Money on deposit in a foreign bank (as defined in §317), including, without limitation, demand and time deposits, and certificates of deposit of a foreign bank;

(b) Debt obligations (including, without limitation, negotiable and non-negotiable instruments, and commercial paper), equity securities, and any other type of investment contract of a foreign national (as defined in §302); or

(c) Any other foreign property; and

(2) Not to use the proceeds of such loan in any manner either:

(a) To replace or substitute for funds that either the unaffiliated foreign national or its U.S. subsidiary otherwise intended to provide or obtain from sources outside the United States; or

(b) To facilitate transfers of funds from the United States that would not have occurred in the absence of such loan.

In satisfying the conditions set forth in paragraphs 3.a.(2) and 3 and 3.b.(1) above, the DI may rely on representations made to it by the unaffiliated foreign national and the latter's U.S. subsidiary, unless the DI believes such representations to be inaccurate.

H. Liquid Foreign Balances

The Office normally will grant a specific authorization to increase the amount of the liquid foreign balances that a DI is allowed to hold under §203(c) provided it can be shown that:

1. The additional balances are required because of a significant change in business activities since the 1965/1966 base period, and

2. It is unduly burdensome to operate within the present limit.

I. Upstreaming the Section 504(b) Earnings Allowable

The Office may authorize a DI which elects the §504(b) earnings allowable to "upstream" all or part of the Schedule A earnings allowable to Schedule B or C, and the Schedule B earnings allowable to Schedule C, provided that the DI:

1. Demonstrates a need for the additional allowables in upstream schedules; and

2. Demonstrates that the upstreamed allowables are not required in the downstream schedules.

Those DIs with losses in a particular schedule in 1969 will be authorized to upstream only a fraction of the downstream allowables. The fraction will be the ratio of the annual earnings in 1969 in all schedules (excluding Canada) to the sum of 1969 annual earnings of schedules in which such earnings are positive.

J. Capitalized Exploration Relief

The Office is prepared to grant specific authorization to make positive direct investment in 1970 in excess of that generally authorized, if such excess is attributable to capitalized exploration expenditures.

Exploration expenditures are defined, in general, as the DI's share of costs, incurred by or for the benefit of AFNs, of acquiring exploration rights and of ascertaining the existence, quantity, quality or location of a mineral resource prior to the determination that a commercially marketable discovery has been made with respect to a reservoir or body of mineral resources. DIs requesting this relief should state in their application the precise definition of exploration expenditures used in their financial accounting. This definition should be consistently followed in submitting data and applying relief.

The relief (R) will in no event exceed an amount equal to: (a) 70% of total capitalized and expensed exploration expenditures (TE) in 1970, less (b) the sum of (i) exploration expensed (EE) in 1970 and (ii) amortization and write-offs in 1970 of previously capitalized exploration (A). In formula terms, $R=0.7TE-(EE+A)$. In some cases the specific authorization may be further limited by other considerations.

The relief will not involve any change in accounting and reporting practices. As a condition for granting relief, the DI will be deemed to have made a transfer of capital in each of the five subsequent years equal to 20% of the amount of specific authorization utilized in 1970.

In addition to the general information required in Section A, the following information should be submitted for each scheduled area for 1968, 1969 and 1970 (estimate):

(1) Total exploration expenditures by all AFNs made in each year with a breakdown between capitalized and expensed.

(2) The amount in each year of amortization and writeoffs of exploration expenditures previously capitalized for all AFNs.

(3) The amount of aggregate unamortized capitalized exploration of all AFNs as of December 31 of each year.

Furthermore, a list of AFNs making exploration expenditures should be submitted. If detailed information on exploration expenditures is not available for non-controlled (50% or less interest by the DI) AFNs, these should be identified and an explanation provided as to the reason why the information is unavailable.

II. APPLICATION FOR AN INTERPRETATIVE OPINION

An application for a legal interpretation or accounting opinion must be submitted in quadruplicate (accompanied by appropriate proof of authority) to the Chief Counsel, or the Assistant Director for Audits and Accounts, Compliance Division, respectively, Office of Foreign Direct Investments, U.S. Department of Commerce, Washington, D.C. 20230. Any printed or written information previously supplied to the Office by the DI may be incorporated in the application by reference.

An application should relate to a particular method of business, or to a particular transaction that the DI actually proposes to consummate with named parties or that the DI has previously consummated, or to an accounting practice that the DI is using or proposes to use. Applications posing general questions or concerning hypothetical situations will not be considered by the Office.

While there is no prescribed form for applications for interpretive opinions, they should contain the information required in Sections A.1. 4, and 5, of Part I (one) above, and also the following information:

A. All material elements of the transaction, including the identities of all AFNs and other parties having a material financial interest in the transaction, and the nature and value of

the consideration involved. If the transaction involves a written agreement, a true copy of such agreement should be attached to the application.

B. If the application relates to an accounting practice, a brief description of the practice, including an authoritative citation showing that the practice is in accordance with accounting principles generally accepted in the United States, and whether it is applied on a basis consistent with the DI's prior year financial statements to its shareholders and reports submitted to the Office.

C. The interpretation requested and the reasons in support of such interpretation, referring, where applicable, to the relevant sections of the Regulations or General Bulletin.

III. APPLICATIONS FOR A SPECIFIC AUTHORIZATION OR EXEMPTION AND/OR AN INTERPRETIVE OPINION

An application for a specific authorization (or exemption) and an application for a legal or accounting interpretation, may be combined in a single submission. Such a combined application may, for example, request a particular interpretation, or, in the alternative should the requested interpretation be denied, a specific authorization (or exemption).

A combined application for a specific authorization (or exemption) and an interpretation should contain the information required in Part I, Section A and Sections B through J, as applicable, and Part II of these instructions, and should be submitted in quadruplicate to the Director, Office of Foreign Direct Investments, U.S. Department of Commerce, Washington, D.C. 20230.

A combined application requesting a legal or accounting interpretation, or, in the alternative, a specific authorization (or exemption) should contain the information outlined in the preceding paragraph and should be submitted in quadruplicate to the Chief Counsel, or to the Assistant Director for Audits and Accounting, Compliance Division, respectively, Office of Foreign Direct Investments, U.S. Department of Commerce, Washington, D. C. 20230.

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